Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-116
No.

In the
Supreme Court of the United States

OCTOBER TERM 1987

JONATHAN STERN, on behalf of himself and all others similarly situated,

Petitioner,

v.

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROGER W. KIRBY
KAUFMAN MALCHMAN KAUFMANN & KIRBY
919 Third Avenue
New York, NY 10022
(212) 371-6600

Attorney for Petitioner

Question Presented

Rule 9(b) provides that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Does Rule 9(b) require a plaintiff to aver intent or other state of mind of a defendant with particularity, especially where defendant is in virtually exclusive possession of the facts respecting its intent?

List of Parties

All formal parties are listed in the caption of the case in this Court.

Respondent Leucadia National Corporation ("Leucadia") had its common stock listed on the New York Stock Exchange at all relevant times. Plaintiff was a stockholder of GATX, a company whose common stock was also listed on the New York Stork Exchange from March 3, 1986, when he purchased his shares for $41.50 each, to April 8, 1986, when he sold his shares for $35.25 each.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Statute Involved 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

1. The decision below conflicts with the decisions of other Courts of Appeals as to the proper interpretation of Rule 9(b) 4

2. The decision below effectively transforms and distorts Rule 9(b) into a device that permits courts to rule upon the merits of a controvery before plaintiff has had discovery and while defendants are in full possession of the facts ... 6

Conclusion 12

Appendix A, First Opinion of the District Court 1a

Appendix B, Amended Complaint 14a

Appendix C, Transcript of Hearing on February 20, 1987 ..... 51a

Appendix D, Endorsement Order Dated February 20, 1987 ..... 71a

Appendix E, Opinion of Affirmance of the Court of Appeals 72a

Appendix F, Rule 9(b) of the Federal Rules of Civil Procedure 101a

Table of Authorities

Cases Cited:

Auslender v. Energy Management Corp., 832 F.2d 354 (6th Cir. 1987) 5

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 4

Cramer v. General Tel. & Electronics Corp., 582 F.2d 259 (3d Cir. 1978) 5

Dan River, Inc. v. Unitex, Ltd., 624 F.2d 1216 (4th Cir. 1980) 10

McGinty v. Beranger Volksvagen, Inc., 633 F.2d 226 (1st Cir. 1980) 5

Panzirer v. Wolf, 663 F.2d 365 (2d Cir. 1981)..... 9

Petro Tech, Inc. v. Western Co. of North America, 824 F.2d 1349 (3d Cir. 1987) 5

Ross v. A.H. Robins, 607 F.2d 545 (2d Cir. 1979) 5

Seattle First National Bank v. Carlstedt, 800 F.2d 1008 (10th Cir. 1986) 5

Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975)..... 5

TSC Industries v. Northway, 416 U.S. 438 (1976).... 4, 10

Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973) 5

Wool v. Tandem Computers, Inc., 818 F.2d 1433 (9th Cir. 1987) 6

Statutes Cited:

28 U.S.C. §1254(1) 2

15 U.S.C. §78aa 2

Fed. R. Civ. P. Rule 9(b), 28 U.S.C. ..... *passim*

Other Authorities:

C. Clark, *Code Pleading* §48, 312 (2d ed. 1947)..... 4

Note, *Pleading Securities Fraud with Particularity*, 97 Harv. L. Rev. 1432 (1984).....4, 6, 7

In the

Supreme Court of the United States

OCTOBER TERM 1987

JONATHAN STERN, on behalf of himself and all others similarly situated,

Petitioner,

v.

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court for the Southern District of New York dismissing the complaint because "the complaint fails to state facts that support its conclusory allegations that Leucadia's intentions to pursue its merger proposals were not genuine" is reported at 644 F.Supp. 1108 (S.D.N.Y. 1986). The opinion is also Appendix A hereto.

The amended complaint ("complaint") is Appendix B hereto. The transcript of the oral opinion of the District Court for the Southern District of New York dismissing the complaint "entirely on the original opinion" is Appendix C hereto.

The opinion of the Court of Appeals affirming the oral decision of the district court that dismissed the complaint is reported at 844 F.2d 997 (2d Cir. 1988), in Fed.Sec.L.Rep. (CCH) Current Vol., ¶93,717 (2d Cir. 1988), and is Appendix E hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The basis of the Distict Court's jurisdiction was §27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78aa.

Statute Involved

The provision involved is Fed. R. Civ. P. Rule 9(b), 28 U.S.C. Its text is set out at Appendix F hereto.

Statement of the Case

The complaint alleges that defendants (sometimes the "Group") violated Section 10(b) of the Exchange Act by leading the investing public to believe that defendant Leucadia would make a good-faith effort to acquire GATX in a merger, although, in a truth that defendants omitted to disclose, Leucadia did not intend genuinely to pursue a merger, having as its sole objective either the receipt of greenmail from GATX or the elicitation of a greater bid for the millions of dollars of GATX common stock owned by the Group.

The complaint specifically alleges and the Court of Appeals pointedly ignores the compelling fact that, after having dealt face-to-face with defendants over an extended period, GATX rejected Leucadia's excuse for backing away from its bid for GATX and concluded, as did plaintiff, that the Group's stated intentions to propose a cash merger with GATX were not genuine (App.B, ¶¶5,

31, 32).* Leucadia's attempt to greenmail GATX was consistent with its history of greenmail (App.B, ¶33).

Plaintiff purchased shares of GATX during the time that the price of its stock had been inflated by defendants' false statements and omissions respecting its merger intentions and sold his shares of GATX at a loss after disclosure that Leucadia did not intend to pursue its purported bid for GATX.

Plaintiff brought the action on behalf of himself and other persons similarly situated to recover damages from defendants on account of their artifical inflation of the price of GATX stock.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision herein, consistent with other decisions of the Second Circuit, requiring a factual foundation and specificity in alleging intent, reflects an interpretation of Rule 9(b) that is in direct conflict with the decisions of many other Courts of Appeals for other circuits and in direct conflict with the plain meaning of Rule 9(b).

The conflict involves an important question of law that should be resolved by the Court because Rule 9(b) has become the defense of first choice in securities fraud cases brought in the Second Circuit. Further, the Court of Appeals' decision undermines the notice pleading standard embodied in the Federal Rules, has added to Rule 9(b) that a plaintiff plead a defendant's intent or state of mind with particularity, and has distorted Rule 9(b) into a device that permits the summary dismissal on the merits of actions alleging fraud in open market securities transactions:

---

* The decision makes only oblique reference to the GATX public statements by alluding to them as "quotations of news reports and commentaries concerning defendants' bid" (App.E, p.88a).

(i) before plaintiff has discovery of defendants; (ii) while defendants are in virtually exclusive possession of the discoverable facts; (iii) here, in the face of statements by the other party to the transaction with defendants that defendants had done exactly that which plaintiff avers; and (iv) here, upon a record that, if genuinely accepted as true, would not even permit the grant of summary judgment pursuant to Rule 56 following discovery.

Such distortion of Rule 9(b) will inevitably result, as it has here, in the dismissal of meritorious claims and the denial of substantive due process.

1. The decision below conflicts with the decisions of other Courts of Appeals as to the proper interpretation of Rule 9(b).

Rule 9(b) is derived from English common-law practice. *See,* C. Clark, *Code Pleading* §48, at 312 (2d ed. 1947). Its provision that "intent . . . may be averred generally" is derived from the recognition by 19th-century English courts that: "Plaintiffs alleging fraud have always found it especially difficult to detail allegations about a defendants' intent." Note, *Pleading Securities Fraud with Particularity,* 97 Harv. L. Rev. 1432, 1437 (1984); *c.f., TSC Industries v. Northway,* 426 U.S. 438, 450 (1976) (interpretations of true intentions are questions of fact). Plaintiff's difficulty is acute in an open-market securities fraud case where plaintiff "is likely to have little first-hand knowledge about the particulars of a fraudulent transaction." *Id.* at 1436, citing *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 744-45 (1975), for its comparison of common law with securities fraud claims.

Against this background, in holding that plaintiffs are not entitled to plead defendants' intent generally but instead must aver "specific" facts respecting intent, the Second Circuit is in direct conflict with the face of Rule 9(b), its legislative and ancestral history, and decisions by

other Courts of Appeals.* *Compare,* 844 F.2d *supra* at 1004 (App. E, pp. 91-92a) ("circumstances must be pleaded that provide a factual foundation for otherwise conclusory allegations of scienter") and *Ross v. A.H. Robins,* 607 F.2d 545, 558 (2d Cir. 1979), *cert. denied,* 446 U.S. 946 (1980) ("It is reasonable to require that plaintiffs specifically plead those events which they assert give rise to a strong inference that the defendants had [scienter]"), with *McGinty v. Beranger Volksvagen, Inc.,* 633 F.2d 226, 228 (1st Cir. 1980) ("The clear weight of authority is that Rule 9 [does not require pleading] the circumstances or evidence from which fraudulent intent could be inferred"); *Petro Tech, Inc. v. Western Co. of North America,* 824 F.2d 1349, 1362 (3d Cir. 1987) ("Rule 9(b) provides that 'malice, intent, knowledge, and other conditions of mind of a person may be averred generally' "); *Cramer v. General Tel. & Electronics Corp.,* 582 F.2d 259, 272-73 (3d Cir. 1978) ("General allegation of the defendants' state of mind meets the minimal requirements of the second sentence of Rule 9[b]"); *Auslender v. Energy Management Corp.,* 832 F.2d 354, 356 (6th Cir. 1987) (" . . . malice, intent or knowledge may be averred generally"); *Tomera v. Galt,* 511 F.2d 504, 508-509 (7th Cir. 1975) ("Rule 10b-5 claimants need not plead nor prove scienter"); *Walling v. Beverly Enterprises,* 476 F.2d 393, 397 (9th Cir. 1973) ("Nor does Rule 9(b) require any particularity in connection with an averment of intent, knowledge or condition of the mind"); *Seattle First National Bank v. Carlstedt,* 800 F.2d 1008, 1011 (10th Cir. 1986) (" 'Rule 9(b) does not . . . require any particularity in connection with an averment of intent, knowledge, or condition of mind' ").

The decisions, other than those of the Second Circuit, interpret Rule 9(b) as essentially a notice rule designed to

---

* The decision makes a self-protective reference to the fact that Rule 9(b) permits intent to be averred generally (App. E, p. 90a), but shows its true, improper view of that Rule 9(b) by affirming the dismissal for failure to provide " 'specific, well-pleaded facts' " (*id.* at pp. 91-92a).

provide defendants with the "'circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.'" *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439-40 (9th Cir. 1987). Allegations based upon information and belief are proper "where, as in cases of corporate fraud [as here], the plaintiffs cannot be expected to have personal knowledge of the facts constituting the wrongdoing." *Ibid.*

Nothing in the decisions below even hints that the complaint fails to identify the circumstances constituting fraud so that defendants could prepare an adequate answer from the allegations. To the contrary, the first paragraphs of the opinion and again at the outset of the discussion entitled "The Allegations Of Fraud" (App. E, pp. 73-74a, 85a) confirm that the complaint gives adequate notice of the allegations.

2. The decision below effectively transforms and distorts Rule 9(b) into a device that permits courts to rule upon the merits of a controvery before plaintiff has had discovery and while defendants are in full possession of the facts.

The Harvard Note (p. 1436 *et seq.*) perceptively states:

> "Fraud claims at common law usually grew out of disputes about the fairness of face-to-face transactions. * * * In such cases, the time and place of the sale and the particulars of the alleged fraud were facts within the buyer's personal knowledge. Thus, in this setting, the particularity requirement was neither especially burdensome nor unreasonable.
>
> In contrast, plaintiffs in contemporary securities fraud cases characteristically have had contact with the defendants only indirectly, through im-

personal market channels. Such cases are in most respects exemplified by action under section 10(b) of the Securities Exchange Act of 1934 and its implementing regulation, Rule 10b-5. Section 10(b) and Rule 10b-5 claims typically involve present or former shareholders' allegations that a corporation manipulated the price of its stock by issuing financial documents that contained misleading statements or omitted material facts.

* * *

Because the plaintiff in a securities fraud case is likely to have little first-hand knowledge about the particulars of a fraudulent transaction, such a plaintiff will typically have greater difficulty pleading fraud with particularity than will a plaintiff alleging common law fraud. * * * Requiring that intent be pleaded with particularity is especially likely to result in the dismissal of meritorious claims. Suppose, for example, that a court requires a plaintiff to plead the exact date on which a company's director or officer became aware of a new product's flaws. Because the only likely sources of this information are the defendant's internal memoranda and the transcripts of its board meetings, the information will not be available to the plaintiff before discovery. Despite the apparent illogic of requiring plaintiffs to plead such information, courts have dismissed claims based on plaintiffs' failures in this regard (See, e.g., *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980). * * * Plaintiffs with meritorious securities fraud claims will seldom be able to plead intent with the extreme particularity demanded by such decisions [citations omitted]."

An analysis of the facts alleged by the complaint and of the decision by the Second Circuit demonstrates that the decision below transforms Rule 9(b) into a device that requires pleading intent and state of mind with particularity and in the Second Circuit permits the dismissal of an action on the merits before plaintiff has had discovery and while defendants are in virtually full possession of the facts respecting their fraudulent intentions.

The complaint alleges that defendants' true intentions respecting GATX were either to obtain greenmail or encourage another bidder to offer more than the Group's $40 bid. The complaint specifically alleges:

(i) The key GATX loan agreements that defendants claimed prompted their need for additional time in order to obtain additional financing, documents to which any serious bidder would pay immediate and serious attention, had been in defendants' possession for weeks and possibly months before defendants sought the extension and had actually been returned to GATX weeks before defendants' claim that they had become aware of certain aspects of them (App. B, ¶¶5, 18, 20, 28, 29, 31, 32);

(ii) GATX rejected defendants' explanation of having to extend the timetable of their bid in order to obtain additional financing, explaining that: (A) defendants had been in possession of the loan documents for weeks (App. B, ¶5, 31); and (B) defendants did not need to request an extension of time to obtain the additional financing (App. B, ¶5, 32).

In dealing with the allegations of the complaint, the Second Circuit pays lip service to its Supreme Court imposed obligations, which arise out of notions of substantive due process, to "assume the truth of the allegations" (App. E, p. 75a) and its Rule 9(b) obligation to permit intent to be averred generally (App. E, p. 90a) before going on to require pleading "specific" facts respecting intent (App. E, pp. 91-92a) and to reject the truth

of the allegations in a fashion that improperly enlarges the scope of its judicial authority pursuant to Rule 9(b), weighs the facts alleged, and makes findings of fact in order to dismiss the complaint.

Except in the most oblique fashion, the Second Circuit ignores the allegations that GATX stated that defendants' purported claims respecting its request for an extension were false (App. B. ¶5). The decision does not accept the truth of these allegations but dismisses the position of GATX as "summaries and quotations of news reports and commentaries concerning defendants' bid" (App. E, pp. 87-88a).* The rejection of these allegations falls short of assuming the truth of the allegations of the complaint, installs the Second Circuit as a trier of fact, and substitutes the business judgment of the Second Circuit for that of GATX.

Were plaintiff obliged to allege "specific, well-pleaded facts" respecting the state of mind of a defendant who is in nearly full possession of the facts, what more could a plaintiff plead in addition to: (i) unrefuted public statements by GATX, which had dealt directly with defendants consistent with the allegations; (ii) unrefuted public filings by defendants and statements by GATX that defendants had had and had long before returned the very documents that they claimed alerted them at the last moment to the need for additional financing; (iii) the undisputed reality that defendants did not have to obtain permission from GATX to obtain an extension; and (iv) Leucadia had twice before sought blackmail (App. B, ¶33).

Moreover, the "findings" embodied in the decision below are illogical, viz.:

---

* In *Panzirer v. Wolf*, the Second Circuit held, however, that a class action planitiff could rely on a column published in the *Wall Street Journal*. 663 F.2d 365, 367 (2d Cir. 1981), *vacated as moot*, 459 U.S. 1027 (1982).

(i) The finding that defendants' Schedule 13D statements were all conditional and mentioned that defendants might dispose of their shares (App. E, p. 92a), although read fairly, if any reading were appropriate pursuant to a Rule 9(b) motion, defendants' filings support the allegation that their boilerplate qualifications were intended to and did indicate to the market that defendants intended to make a good faith bid for GATX. No other reading would explain the sudden, significant jump in the price of GATX stock upon the initial filing and its subsequent decline when the market learned that the Group was not going to pursue its merger attempt (App. B. ¶¶6, 17).* The question of whether defendants made a material omission or misrepresentation respecting their true intentions is a question for the trier of fact. *TSC Industries v. Northway,* 426 U.S. *supra* at 450. The decision's factual interpretation of these filings to justify dismissal of the complaint confirms that the Court of Appeals rendered a Rule 56 decision in Rule 9(b) clothing.

(ii) The finding that Leucadia agreed to pay Merrill Lynch a substantial fee if the Group sold more than 51% of its holdings in GATX (App. E, p. 92a), an arrangement that logically suggested, if anything, an intention to sell shares rather than to acquire them by merger.

(iii) The finding that the Group "never called off the merger; it asked GATX for a brief extension of time to obtain additional financing, which GATX declined to provide" (*ibid*), although, in light of Leucadia's history of greenmail, the Group's SEC filings indicating that it had already reviewed and returned the GATX documents (App. B, ¶¶5, 18, 28), GATX comments that it did not believe the Group's proffered explanation because it had had the

* That the filings made a pass at facial sufficiency is not a defense. *Dan River, Inc. v. Unitex, Ltd.,* 624 F.2d 1216 (4th Cir. 1980). Moreover, the decision does not explain why market action was not the fair reader of defendants' filings.

documents long before (App. B. ¶5), and that, regardless, defendants did not need to request an extension of time (App. B, ¶5, 32), it must be reasonably inferred that the Group's request for an extension was a final attempt to elicit another bidder or induce GATX to pay greenmail.

Regardless, the Second Circuit's requirement that pleadings aver "specific, well-pleaded facts" respecting defendants' intent introduces a requirement that is not in Rule 9(b) and that conflicts directly with the decisions of the other Courts of Appeals.

The Second Circuit has manifestly transformed Rule 9(b) into a device summarily to dismiss any case that it arbitrarily decides is a strike suit (App. E, p. 89a), and thus Rule 9(b) has become the defense of first choice in securities fraud cases.

Given defendants' history of greenmail, the incredibility of the actions surrounding their request for an extension of their bid, and GATX's recognition of defendants' lack of *bona fides,* this action cannot be considered a strike suit. If it were, it would not be proper to dismiss it under Rule 9(b) for failure to have done something that is neither required by Rule 9(b) nor possible, viz., aver "specific" facts concerning defendants' state of mind. The decisions of the Second Circuit conflict with those of other circuits and the plain meaning of Rule 9(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 13, 1988

Respectfully submitted,

ROGER W. KIRBY
KAUFMAN MALCHMAN KAUFMANN
& KIRBY
919 Third Avenue
New York, NY 10022
(212) 371-6600

Attorney for Petitioner

Appendix A
First Opinion of the District Court

Jonathan STERN, on behalf of himself and all others similarly situated, Plaintiff,

v.

LEUCADIA NATIONAL CORPORATION, LNC Investments, Inc., Charter National Life Insurance Company, American Investment Company, Leucadia Inc., Uintah National Corporation, TLC Associates, Carl Marks & Co., Inc., Ian N. Cumming, Joseph S. Steinberg, Cumberg, Inc., Marks Investing Corp., and S & S Securities, Inc., Defendants.

No. 86 Civ. 3127 (GLG).

United States District Court,
S.D. New York.

Oct. 7, 1986.

Kaufman Malchman Kaufmann & Kirby, New York City (Irving Malchman, Roger W. Kirby, Lorna N. Graham, of counsel), for plaintiff.

Weil, Gotshal & Manges, New York City (Dennis J. Block, Jonathan M. Hoff, Patri-

cia A. Olah, of counsel), for defendants except Carl Marks & Co., Inc.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Sidney S. Rosdeitcher, Shira Perlmutter, of counsel), for defendant Carl Marks & Co., Inc.

GOETTEL, District Judge:

Plaintiff Jonathan Stern brings this putative class action alleging that the defendants violated section 10(b) of the Securities and Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78j(b) (1982), and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.-10b–5 (1986), by filing Schedule 13D statements that contained material omissions or misrepresentations. The defendants are seven corporate entities that co-signed the 13D schedules at issue, several other corporations, and two individuals.

The allegations of the complaint are pleaded on information and belief and include the following facts, which we accept as true for purposes of deciding defendants' motions to dismiss: On January 9, 1986, Leucadia National Corp. ("Leucadia") and six other corporate defendants (LNC Investments, Inc.; American Investment Co.; Charter National Life Insurance Co.;

Leucadia Inc.; Uintah National Corp.; and TLC Associates), collectively referred to as the "signing defendants," filed a Schedule 13D with the SEC stating that they had purchased or acquired options to purchase 5.26% of GATX Corporation's ("GATX") outstanding shares. The 13D stated that they might seek to take over control of GATX by one of several means, including a merger proposal or tender offer. It also stated that they might dispose of their shares of GATX stock in the open market or privately.

On January 30, 1986, the signing defendants filed an amended 13D in which they declared an increase in their onwership of GATX stock and revealed that they were exploring the possibility of acquiring certain of GATX's assets, in connection with which they had entered into several agreements with GATX: (1) a confidentiality agreement whereby GATX would furnish them with certain information, and (2) a standstill agreement whereby they would not acquire additional stock while the agreement was in force. On February 3, 1986, the defendants filed another amended 13D declaring that the confidential information had been returned to GATX and, thus, both of the above agreements were terminated. On February 12, 1986, defend-

ants filed a third amendment to their 13D disclosing Leucadia's proposed cash merger with GATX for $38/share, subject to various approvals, a due diligence review, and Leucadia's ability to arrange the necessary financing. That offer was rejected. On February 25, 1986, defendants filed a fourth amendment to their 13D noting they now owned 8.86% of GATX stock.

On March 4, 1986, defendants again amended their 13D and stated that GATX had rejected the $38 offer on February 13, but that on February 28, Leucadia had increased its offer to $40/share and entered into a confidentiality agreement with GATX for the latter to furnish Leucadia with additional confidential information for a due diligence review. On March 12, 1986, after completing a diligence review, the defendants once more amended their 13D to indicate that Leucadia continued to be willing to offer $40 per share, contingent, as before, on its obtaining financing. These developments were reported by the Dow Jones News Service the same day, along with the fact that two other companies had made bids for GATX, one for $40 and one for $42/share. On March 22, GATX accepted Leucadia's offer. However, on March 25, Leucadia requested a one-week extension before entering into a

definitive merger agreement, claiming that, since certain GATX debts would come due immediately in the event of a merger, it needed time to arrange for additional financing. GATX refused to grant this request and the deal fell through.

The plaintiff claims that the signing defendants never intended to go through with the merger and were merely manipulating the market price of the stock. The complaint alleges that the defendants "intentionally omitted from the ... Schedule 13Ds the material fact that it was [their] basic and primary purpose ..., after inflating the market price, either to sell GATX's stock back to GATX for a substantial premium above market price or to sell such stock to another bidder for GATX at a substantial premium above market price." Complaint ¶ 29. It is not alleged that the defendants sold their stock to GATX, or anyone else, for a substantial premium. Indeed, it was conceded that the stock was held for a period of time, then sold in the market at a loss.

The plaintiff asserts that prior to the alleged scheme GATX stock was selling for approximately $34 per share. The plaintiff purchased GATX stock on March 3, 1986, for $41.50 per share. Plaintiff sold his stock on April 8, 1986, at $35.25 per share.

He claims the defendants' allegedly fraudulent merger proposals caused the price of GATX stock to rise during January, February, and March 1986, and then fall substantially once their deal fell through. The plaintiff purports to represent a class of all those who purchased stock in GATX between January 9, and March 26, 1986.

In addition to the signing defendants, the other named defendants are several corporations and two individuals, Ian N. Cumming and Joseph S. Steinberg. The complaint alleges that Cumming and Steinberg, along with Leucadia, are "controlling persons" of the corporate defendants, except perhaps Carl Marks & Co., Inc. ("Carl Marks"). The complaint sets forth a rather confusing description of interlocking ownership of the various corporations. The ownership of Leucadia and the other signing defendants is traced back to Cumming, Steinberg, and a corporation called Cumberg, Inc. The latter is allegedly owned by the two individuals and the last two corporate defendants, S & S Securities and Marks Investing Corp. ("MIC"). MIC is alleged to be partly owned by the same two individuals, partly owned by Leucadia, and partly owned by defendant Carl Marks. The complaint does not allege what propor-

tionate share each owns, or if they represent all or only some of the owners of MIC.

All defendants now move to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b), for failure to state a claim upon which relief can be granted and for failure to plead fraud with particularity. Carl Marks moves separately as well, arguing that, even if upheld as to the other defendants, the complaint fails to state a claim against it.

A cause of action under section 10(b) of the Act and Rule 10b–5 promulgated thereunder must allege "that, [1] in connection with the purchase or sale of securities, [2] the defendant, acting with scienter, [3] made a false material representation or omitted to disclose material information and [4] that plaintiff's reliance on defendant's actions caused him injury." *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir.1985). Furthermore, a claim of securities fraud must satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Thus, a plaintiff must "allege the existence of facts and circumstances sufficient to warrant the pleaded conclusion that fraud [ ] occurred." *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 119

(2d Cir.1982). *See Luce v. Edelstein*, 802 F.2d 49, 54 n. 1 (2d Cir.1986). "[D]istorted inferences and speculations" will not suffice. *Segal v. Gordon*, 467 F.2d 602, 606 (2d Cir.1972). *See Shamrock Associates v. Horizon Corp.*, 632 F.Supp. 566, 571–72 (S.D.N.Y.1986). The defendants argue that the plaintiff fails to adequately allege the element of material misrepresentation or omission, and the element of reliance and causation.

The complaint sets forth statements made by the signing defendants in their original Schedule 13D filing and the many amendments thereto. The Schedule 13D and amendments specified a variety of possible actions that the defendants were considering, including possible takeover of GATX or sale of all their stock. The plaintiff alleges that defendants never intended even the possibility of a takeover and, accordingly, materially misrepresented their intentions. However, the complaint fails to state facts that support its conclusory allegations that Leucadia's intentions to pursue its merger proposals were not genuine. *See Luce v. Edelstein, supra*, at 54–55. Some of the facts pleaded actually weaken the plaintiff's allegations against these defendants. Every 13D filing by the signing defendants was conditional. The early fil-

ings noted the possibility of selling stock as well as of seeking control of GATX. Later filings stated that Leucadia's offers were contingent on arranging financing, getting shareholder approval, etc. Furthermore, Leucadia hired a financial advisor to consider the possible cash merger, agreed to restrictions on its sale of GATX stock while a merger was being explored, and negotiated an agreement with Merrill Lynch whereby Leucadia would pay Merrill Lynch a $400,000 penalty if Leucadia sold more than 51% of its stock in GATX. None of these facts support the plaintiff's conclusory allegation that Leucadia never intended to follow through on a merger or takeover bid for GATX.

On the other hand, as noted earlier, no allegation is made that Leucadia ever sold or attempted to sell its GATX stock when its deal evaporated. Leucadia, we note, did not withdraw its offer. Rather, when GATX accepted Leucadia's offer of $40 per share, Leucadia asked for a one-week extension of time to arrange additional financing. As the signing defendants' 13Ds had always stated, the bid for GATX was contingent on, *inter alia*, Leucadia's ability to arrange financing. GATX rejected the request for additional time and the deal collapsed.

The plaintiff also fails to adequately plead the element of reliance and causation. "[C]ourts will presume reliance only when it is logical to do so." *Reingold v. Deloitte Haskins & Sells*, 599 F.Supp. 1241, 1263 (S.D.N.Y.1984). Here, it is not. The plaintiff paid $41.50 per share for GATX stock at a time when Leucadia had only offered $40 per share. This hardly demonstrates reliance by the plaintiff on Leucadia's bid. If anything, the plaintiff may have been hoping that a bidding war would ensue and that the GATX stock would rise above the price at which he bought it. However, this does not state a claim for fraud against these defendants. In addition, the defendants' 13Ds at all times stated that Leucadia's offer was subject to a number of contingencies, including its ability to arrange financing. One news report stated that Leucadia thought it was highly likely it would be able to get the necessary financing. Still, we do not find it logical or reasonable for the plaintiff to rely on this single, hopeful report as the basis for his purchase. This is especially true when, as in this case, the plaintiff is well acquainted with the mercurial nature of the stock market.

The plaintiff next argues that Leucadia's actions created a fraud on the mar-

ket, driving up the price of GATX stock by proposing a merger while actually intending to sell out at a premium once the price went up. However, Leucadia was not the only company bidding for GATX. No facts are stated that suggest that these defendants' actions, as opposed to the acts of the other bidders, caused the increase in the price of GATX stock. And, as already mentioned, the plaintiff does not allege that the defendants sold their GATX stock, for a premium or otherwise. We find, therefore, that the plaintiff has failed to state a claim upon which relief can be granted against the signing defendants. The complaint is likewise deficient against defendants Cumming, Steinberg, Cumberg Inc., S & S Securities, and MIC, since any claim against them rests solely upon the vague allegation that they either control or are part of an interlocking network of corporations affecting the management of the signing defendants.

The only "act" allegedly committed by Carl Marks is its filing of a Schedule 14B on February 18, 1986, stating that it was considering a proxy solicitation regarding GATX, and its amendment of that 14B on March 20, 1986, withdrawing its consideration of such a plan. No facts alleged imply that these statements contained false or misleading material facts. The plaintiff

nevertheless attempts to tie this thread into the gossamer web of conspiracy allegedly being woven by all of the defendants to inflate the market price for GATX stock. The fact that Carl Marks owned some portion of stock in MIC, which owned some portion of stock in Cumberg, Inc., which owned some portion of stock in a chain of corporations including Leucadia, does not reasonably lead to the inference that the filing and amending of 14B statements by Carl Marks was intended for any other than the stated purpose. Carl Marks owned a substantial interest in GATX, a greater interest than its attenuated connection with Leucadia. It is hard to imagine that Carl Marks intended to boost the value of its GATX stock by some roundabout means rather than proceed directly, as it did, to explore the possibility of taking action within GATX by a proxy solicitation.

We reach the same result regarding the plaintiff's claim that Carl Marks acted as an aider and abettor or conspirator of the other defendants. In order to state a claim of aiding and abetting, the plaintiff must allege that Carl Marks had knowledge of other defendants' violation of the securities laws, and provided substantial assistance to them. *IIT, an International Investment Trust v. Cornfeld*, 619 F.2d

909, 922 (2d Cir.1980). The facts noted above, which are the only ones alleged regarding Carl Marks, are inadequate to state such a claim. The elements of a claim of conspiracy to violate the securities laws are "(1) an agreement between the conspirator and the wrongdoer, and (2) a wrongful act committed in furtherance of the conspiracy." *Whitbread (US) Holdings, Inc. v. Baron Philippe De Rothschild, S.A.*, 630 F.Supp. 972, 983 (S.D.N.Y. 1986). Again, no facts are alleged that support this claim. Other than stating the relationship between the various corporations, the plaintiff makes no allegation of meetings or agreements among Carl Marks and any other defendants. The plaintiff's conclusory allegation of conspiracy is unsupported by his pleading.

Charges of fraud, including securities fraud, are a serious matter and should not be made lightly or upon speculative inferences of inappropriate intentions. Rather, such claims must set forth specific, well-pleaded facts. Accordingly, we grant both motions to dismiss the complaint, with leave to replead in twenty (20) days, if such repleading can allege sufficient facts upon which the allegations rest.

SO ORDERED.

Appendix B
Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN STERN, on behalf of himself and all others similarly situated,

Plaintiff,

- against -

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORPORATION, TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP., and S & S SECURITIES, INC.,

Defendants.

---

86 Civ. 3127 (GLG)

AMENDED COMPLAINT
CLASS ACTION

JURY TRIAL DEMANDED

Plaintiff for his Amended Complaint alleges, upon information and belief, except as to those allegations which pertain to the named plaintiff

and his counsel, as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78aa. The claims herein arise under §10(b) of the Exchange Act, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission.

2. Most of the defendants reside in this district and have their principal places of business here. Many of the acts and transactions constituting the violations of law complained of occurred in this district.

SUMMARY OF PLAINTIFF'S CLAIM

3. As is alleged more fully hereinbelow, defendants, aiding and abetting and conspiring with one another ("defendants"), artificially inflated and manipulated the market prices of the common stock of GATX Corporation ("GATX") on the New

York Stock Exchange ("Exchange") between January 9, 1986 and March 26, 1986, inclusively. Defendants accomplished this scheme by making untrue statements of material facts respecting the purpose of their acquisition of shares of GATX and by omitting to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading. Specifically, the mix of materially false information respecting the purpose of defendants' purchases of said shares that defendants willfully caused to be disseminated into the market place caused the reasonable investor to believe that, subject to certain essentially mechanical conditions, defendants would seek to merge with GATX when in truth defendants had no genuine intention of carrying out the merger even when the announced conditions were met.

4. At the end of 1985, GATX had about 13 million shares of common stock outstanding and

approximately 13,700 shareholders. Said inflation of the market prices of GATX's stock was effected by defendants by purchasing more than 5% of the outstanding shares of GATX common stock on the Exchange and by filing false and misleading Schedule 13Ds with the SEC which led a sizeable part of the investing public to believe that defendants were purchasing the common stock of GATX for the purpose of taking it over at a price substantially above the approximately $34.00 per share at which GATX was trading prior to the commencement of the scheme alleged. Defendants concealed from the SEC and the public that their basic and primary purpose in purchasing the common stock of GATX was materially different from that which they disclosed, namely, to inflate the market price of GATX's stock and, then either sell the stock back to GATX at a substantial premium above the market price or sell the stock to another bidder for the GATX at a substantial premium above the market price.

5. On January 9, 1986, defendants filed the first of a series of Schedule 13Ds and documents intended to create the impression in the minds of the investing public that defendants would make a bone fide bid to acquire GATX. But on March 26, 1986, after GATX had accepted a bid by defendant Leucadia National Corporation ("Leucadia") to purchase GATX for $40.00 per share, Leucadia stated that it would need additional time to determine whether it would proceed with the offer. A few days later, Leucadia withdrew its bid on the pretext that it had not been fully cognizant of the details of certain key GATX loan agreements. In truth, Leucadia had been fully cognizant of the details of said loan agreements at the time that it made its $40.00 "bid". According to Business Week, "GATX quickly denied Leucadia's claim [that Leucadia had not been fully cognizant of certain provisions of loan agreements], saying that the disputed documents had been in Leucadia's

hands for weeks. *** Others believe that [Leucadia] was only fishing for greenmail or trying to smoke out a higher bidder. 'They saw they were either going to lose face or lose money, and they chose to lose face', says one trader. 'They found an excuse to walk away.'" (April 14, 1986 at pp. 37-38). In short, no-one could have been more surprised than defendants to learn that GATX had accepted Leucadia's $40 bid and that no-one was left to bid up the stakes, which would have provided defendants with an opportunity to dispose of their GATX shares at a substantial profit. As Barron's wryly put it, "One strategy to fight off a takeover move is to say yes. GATX tried it when Leucadia National made an offer, and it worked. That deal fell through, with some suspecting Leucadia wanted greenmail to begin with" (May 26, 1986 at p. 68).

6. During the course of the scheme, defendants manipulated the market prices of GATX stock on the Exchange from approximately $34.00 per

share up to approximately $42.00 per share. Within four trading days of the disclosure by Leucadia that it would not proceed with its offer, GATX common stock dropped to about $35.00 per share. According to Barron's, Leucadia cleared out its position of 1.1 million shares of GATX at $33 3/8 per share, evidently about breaking even (ibid), unlike the members of the class who suffered substantial damages.

CLASS ACTION ALLEGATIONS

7. (a) Plaintiff brings this as a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) on behalf of the class hereinafter described. The class consists of all persons similarly situated who purchased the common stock of GATX during the period between January 9, 1986 (the date upon which defendants filed their first Schedule 13D with the SEC) and March 26, 1986 (the date upon which defendants intimated, albeit disingenuously and incompletely, that they would not be proceeding

with their bid for GATX), both dates inclusive ("Class Period") and who suffered damage resulting from the acts and transactions herein complained of. Members of the class are so numerous that joinder of all members is impracticable in that millions of shares of the common stock of GATX were purchased by thousands of members of the class during the Class Period.

(b) Questions of fact and law common to the me bers of the class exist and predominate over any questions affecting only individual members of the class. Among the questions of law and fact common to the class are:

(i) whether the federal securities laws were violated by defendants' acts and transactions alleged herein;

(ii) whether the basic and primary purpose of defendants in purchasing the stock of GATX was, after inflating the market price, either to sell their GATX stock back to GATX at a substantial

premium above the market price or to a higher bidder at a substantial premium above the market price;

(iii) whether defendants engaged in an unlawful inflation and manipulation of the price of GATX's stock on the Exchange;

(iv) whether defendants acted willfully, recklessly or with gross negligence in destroying the integrity of the market price of GATX stock during the class period by falsely inflating the market price of GATX's stock;

(v) whether the members of the class have sustianed damages; and

(vi) what measure of damages is applicable.

(c) The claim of the plaintiff is typical of claims of the class as all class members sustained damages arising out of the defendants' acts and transactions alleged herein, which artificially inflated the market price of GATX common stock.

(d) The plaintiff will fairly and adequately protect the interests of the class and has retained counsel competent and experienced in class and federal securities litigation to further insure such protection.

(e) A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since the class is so numerous and its membership so widespread that joinder of all members is impractical. Furthermore, as individual damages may be relatively small, the expense and burden of non-class litigation may very well make it impossible for many members to redress their wrongs.

THE PARTIES

8. Plaintiff is a resident of the State of New Jersey. On March 3, 1986, plaintiff purchased shares of GATX at $41.50. In making these purchases, he reasonably relied on the good faith of Leucadia's then extant proposed cash merger proposal

respecting GATX. He sold these shares on April 8, 1986 for $35.25 each.

9. Defendants comprise a series of affiliates and subsidiaries who are ultimately controlled by defendants Cumming and Steinberg.

10. Defendant TLC Associates ("TLC"), a New York general partnership, owns all of the outstanding shares of defendant Uintah National Corporation ("Uintah"), which owns 48% of the outstanding shares of Leucadia, which owns all of the outstanding shares of defendant Leucadia Inc. ("LI"), which owns all of the outstanding shares of defendant LNC Investments, Inc. ("LNC") and 94% of the outstanding shares of defendant American Investment Company ("AIC"), which owns all of the outstanding shares of defendant Charter National Life Insurance Company ("Charter").

11. TLC in turn is owned by defendants Cumming, Steinberg, and defendant Cumberg, Inc., an entity owned by defendants Cumming and

Steinberg, defendant Marks Investing Corp., and defendant S & S Securities Inc. Leucadia, Cumming, and Steinberg own more than 50% of the outstanding shares of Marks Investing, and Cumming and Steinberg own a percentage of the outstanding shares of S & S Securities Inc. Defendant Carl Marks & Co., Inc. owns a portion of Marks Investing.

12. The defendants herein conspired with, and aided and abetted, each other in the violations of Rule 10b-5 hereinafter alleged. Also, defendants Leucadia, Cumming, and Steinberg were each a controlling person of each of the other defendants (except possibly Carl Marks & Co., Inc.) within the meaning of Section 20(a) of the Exchange Act, 15 U.S.C. 78t(a), and, as such, are liable jointly and severally with, and to the same extent, as each of the other controlled defendants herein.

THE VIOLATIONS OF RULE 10b-5

13. Section 13(d) of the Exchange Act, as administered by the SEC, requires that any person

acquiring, directly or indirectly, a five percent or more interest in any class of equity securities of a public company must make a public filing (on "Schedule 13D") with the SEC and state, among other things, the filing person's purpose in acquiring such securities.

14. The Schedule 13Ds, and various amendments thereto, filed with the SEC by defendants falsely and misleadingly omitted the material fact that it was the basic and primary purpose of defendants either to sell their shares of GATX back to GATX at a substantial premium over defendants' purchase prices or to induce some other entity to make a bid substantially above market price for GATX, thereby permitting defendants to reap large profits.

15. On January 9, 1986, Leucadia, LNC, AIC, Charter, Leucadia National, Uintah, and TLC ("signatory defendants") filed a Schedule 13D with the SEC stating that they had purchased, or had acquired options to purchase, 677,400 shares of the outstanding

stock of GATX. That number of shares represented 5.26% of the outstanding shares of GATX. Defendants described the purpose of those transactions as follows (Item 4. Purpose of Transaction):

> "The Beneficial Owners have acquired (and are acquiring) the shares of the Common Stock of the Company referred to in Item 5 in order to obtain an equity position in the Company, the Common Stock of which, in the opinion of the Beneficial Owners, is presently undervalued. The Beneficial Owners may consult with management and/or other concerned shareholders of the Company concerning the affairs of the Company and to influence management in formulating and implementing future policy designed to maximize shareholder value. The Beneficial Owners may seek an active role in the affairs of the Company and/or seek representation on the Board of Directors of the Company.
>
> "From time to time, the Beneficial Owners will evaluate their position and may determine to seek control of the Company. Preliminary to any determination to seek control, the Beneficial Owners may explore the feasibility of, and strategies for, obtaining control and may explore, among other possibilities (1) making a proposal to the Company for a merger or business combination; (2) acquiring additional shares of the Common Stock or shares of the Company's preferred stock (subject to the availability

of shares at prices deemed favorable and the availability of any requisite financing) from time to time in the open market, in privately negotiated transactions, by tender offer or otherwise; (3) engaging in a solicitation of proxies to elect its nominees as directors of the Company; or (4) entering into arrangements with third parties who may be interested in joining with the Beneficial Owners to acquire control of the Company, which arrangements may contemplate the sale or other disposition of portions of the Company's assets to such third parties after control is obtained.

"Depending upon the course of action that the Beneficial Owners pursue, the Beneficial Owners may attempt to dispose of shares of Common Stock in the open market, in privately negotiated transactions or otherwise.

"Although the foregoing represents the range of activities presently contemplated by the Beneficial Owners with respect to the Company and the Company's voting securities, it should be noted that the possible activities of the Beneficial Owners are subject to change at any time and there is no assurance that the Beneficial Owners will actually purchase any additional shares of the Common Stock or any shares of preferred stock or seek to influence or obtain control of the Company. Except as set forth above, the Beneficial Owners have no plans or proposals which relate to or would result

in any of the transactions described in subparagraphs (a) through (h) of Item 4 of Schedule 13D."

16. On January 9, 1986, 4:24 p.m., the Dow Jones News Service reported Leucadia's acquisition of 5.26% of GATX stock and that 'the Leucadia Group ...may seek decide to seek control of the Company through proposing a merger or business combination, acquiring additional shares, or beginning a proxy contest."

17. On January 9, 1986, the price of GATX common stock as traded on the New York Stock Exchange closed at $34 and 7/8. On January 10, 1986, the price closed at $38 and 1/2 per share.

18. On January 30, 1986, signatory defendants filed Amendment No. 1 to Schedule 13D, indicating that they had now acquired, or had acquired the option to acquire, 811,000, or 6.30%, of the outstanding shares of GATX and describing the purpose of transaction as follows (Item 4. Purpose of Transaction):

"The Beneficial Owners are exploring the possibility of acquiring certain of the Company's assets ('Assets'). On January 28, 1986, in connection with their interest in such a transaction, the Beneficial Owners entered into a Confidentiality and Standstill Agreement with the Company, a copy of which is filed with this Amendment No. 1 as Exhibit 2 (the 'Agreement'). The Agreement provides that the Company will furnish the Beneficial Owners with certain written information (the 'Information') and the Beneficial Owners will keep the Information confidential. The Agreement also provides that, from and after the date of the agreement until 24 hours after Leucadia has destroyed all the Information or returned it to the Company (which the Beneficial Owners may do at any time and are obligated to do if a definitive agreement for the Assets is not entered into by February 10, 1986), the Beneficial Owners will not, among other things, (i) acquire any additional voting securities of the Company (except to the extent of the commitments described in the Schedule 13D and this Amendment); (ii) act in concert with any third parties for the purpose of acquiring, holding, voting or disposing of any voting securities of the Company; or (iii) solicit, negotiate or provide any information to any third party with respect to any acquisition of the Company, any of its voting securities or all or any portion of its assets."

19. On January 30, 1986, the Dow Jones News Service reported at 12:43 p.m. that the Leucadia Group had "entered into a confidentiality and standstill agreement with GATX on January 28. Under terms of the agreement GATX will provide the Leucadia Group with certain confidential information and the Group will refrain from purchasing additional GATX shares shares on in taking certain actions regarding an acquisition of GATX." The item was reported the next day in the Wall Street Journal.

20. On February 3, 1986, signatory defendants filed Amendment No. 2 to Schedule 13D, indicating that they still had, or had the right to acquire, 811,000, or 6.30%, of the outstanding shares of GATX and describing the purpose of transaction as follows (Item 4. Purpose of Transaction):

> "The waiting period under the HSR Act terminated on February 3, 1986.
>
> "On February 6, 1986, pursuant to the Confidentiality and Standstill Agreement (the "Agreement") between the Beneficial Owners and the Company (a copy of which was filed as Exhibit 2 to Amend-

> ment No. 1 to the Schedule 13D), Leucadia delivered a letter to Morgan Stanley & Co. Incorporated, the Company's financial advisor, stating that Leucadia had destroyed or returned all Information furnished to the Beneficial Owners pursuant to the Agreement and, accordingly, the Termination Date (as defined in the Agreement) would occur on February 7, 1986. After the Termination Date, certain restrictions imposed on the Beneficial Owners by the Agreement, including a restriction on the acquisition of additional voting securities by the Beneficial Owners, will terminate."

21. On February 7, 1986, 2:50 p.m., the Dow Jones News Service reported that Leucadia had "returned the information furnished to it by GATX concerning certain of GATX's assets and that Leucadia said 'Accordingly certain restrictions imposed on Leucadia by the January 28 confidentiality and standstill agreement between Leucadia and GATX, including a restriction on the acquisition of additional voting securities of GATX will terminate today.'" The item was also reported the following day in the Wall Street Journal.

22. On February 12, 1986, signatory defendants filed Amendment No. 3 to Schedule 13D, indicating no change of ownership of the outstanding shares of GATX and describing the purpose of transaction as follows (Item 4. Purpose of Transaction):

> "On February 11, 1986, Leucadia sent a letter to James J. Glassner, Chairman of the Board of Directors of the Company, a copy of which is filed herewith as Exhibit 1 and incorporated herein by reference. In the letter, Leucadia proposed a cash merger with the Company pursuant to which holders of the Company's common stock would receive at least $38.00 per share in cash. Leucadia stated further that, as an alternative, it would be prepared to discuss a transaction whereby the Company would distribute its capital equipment leasing business to all of its present shareholders and the cash merger price would be reduced by an agreed amount. Leucadia stated that consummation of the transaction would be subject to negotiation, preparation and execution of a definitive merger agreement, the requisite regulatory approvals, satisfactory completion by Leucadia of diligence (which it would be prepared to commence promptly) and Leucadia's arrangement of requisite financing."

23. On February 13, 1986, 11:00 a.m., the Dow Jones News Service reported that, GATX had informed Leucadia that "it would consider a Leucadia offer if it formulated a 'specific bona fide approval.'" "GATX also said that it would provide Leucadia with non-public information about GATX subject to a confidentiality agreement." The item was reported the following day by the Wall Street Journal.

24. On February 25, 1986, signatory defendants filed Amendment No. 4 to Schedule 13D, indicating that they beneficially owned 1,140,300, or 8.86%, of the outstanding shares of GATX.

25. On February 28, 1986, 1:49 p.m., the Dow Jones News Service reported that "Leucadia raises its bid for GATX Corp. to $40 a share", providing GATX with a letter from Merrill Lynch Capital Markets stating that Merrill Lynch was highly confident that it can obtain the necessary financing for Leucadia's offer of $40 per share." The item also reported that GATX had announced earlier

in the week that "it had received a $40 a share offer from a group led by Adler & Shaykin, a New York based investment banking firm." The item also reported that GATX had received a "'conditional' offer of $42 per share in cash and notes from Gabelli & Co." The item was reported the following day by the Wall Street Journal.

26. On March 4, 1986, signatory defendants filed Amendment No. 5 to Schedule 13D, indicating no change in their ownership of the outstanding shares of GATX and describing the purpose of transaction as follows (Item 4. Purpose of Transaction):

> "On February 13, 1986, the Company announced that it had rejected Leucadia's proposal (discussed in Amendment No. 3 to the Schedule 13D) of a cash merger with the Company pursuant to which holders of the Company's Common Stock would have received at least $38.00 per share in cash."
>
> "On February 28, 1986, Leucadia sent a letter to James J. Glasser, Chairman of the Board of Directors of the Company, a copy of which is filed herewith as Exhibit 1 to this Amendment No. 5 and incorporated herein by reference. In the letter, Leucadia proposed a cash

merger with the Company pursuant to which holders of the Company's Common Stock would receive not less than $40.00 per share in cash (the 'Proposed Transaction'). Leucadia stated that consummation of the Proposed Transaction would be subject to the arrangement of requisite financing, the negotiation, preparation and execution of a definitive merger agreement, approval by the Company's shareholders and any requisite regulatory approvals and the satisfactory completion by Leucadia of Diligence (which it would be prepared to commence promptly). Leucadia also stated in the letter that it remained confident of its ability to obtain the funds necessary to complete the Proposed Transaction, and that in this regard it had retained Merrill Lynch Capital Markets ('Merrill Lynch') as its financial advisor and had been advised by Merrill Lynch that Merrill Lynch is 'highly confident' of its ability to place an amount of Leucadia securities sufficient to enable Leucadia to complete the Proposed Transaction.

"In connection with the Proposed Transaction, Leucadia and the Company have entered into a Confidentiality Agreement, dated February 28, 1986 (the 'Confidentiality Agreement'), a copy of which is filed as Exhibit 2 to this Amendment No. 5 and incorporated herein by reference. The Confidentiality Agreement provides, among other things, that the Company will furnish Leucadia with certain information (the 'Information') and that Leucadia will

keep the Information confidential. The Agreement also provides that for a period of two years from the date of the Agreement, the Beneficial Owners will not, among other things, (i) acquire more than 20% of the outstanding Common Stock or (unless invited to do so by the Company) propose a business combination transaction relating to the Company; (ii) solicit proxies with respect to any matter; (iii) act in concert with any third parties for the purpose of acquiring, holding, voting or disposing of any voting securities of the Company; or (iv) solicit, negotiate with or provide any information to any third party with respect to an acquisition of the Company, any of its voting securities or all or any portion of its assets. The restrictions imposed by the Confidentiality Agreement will cease to be applicable if certain specified events occur, including the failure by the Company to enter into a definitive merger agreement with Leucadia within ten days after Leucadia completes its diligence review of the Company, and advises the Company that Leucadia continues to be willing to effect the Proposed Transaction. Under the terms of the Confidentiality Agreement, Leucadia must complete its diligence review no later than March 29, 1986.

"Leucadia will continue to evaluate its position in light of the Company's response to its proposal."

27. In addition, Item 6, of Amendment No. 5 Contracts, Arrangements, Understandings or Relationships with Respect to Securities of the Issurer, stated:

> "The information contained in Item 4 of this Amendment No. 5 is incorporated herein by reference.
>
> "Pursuant to the terms of its engagement letter with Merrill Lynch, if, prior to March 1, 1987 (subject to extension in certain circumstances) Leucadia receives consideration for at least 51% of the Common Stock owned by Leucadia or any of its subsidiaries at the time of such receipt, Leucadia will pay Merrill Lynch a transaction fee not to exceed $400,000."

28. On March 14, 1986, signatory defendants filed Amendment No. 6 to Schedule 13D, indicating no change in their ownership of the outstanding shares of GATX and describing the purpose of transaction as follows (Item 4. Purpose of Transaction):

> "On March 12, 1986, Leucadia sent a letter to the Company stating that Leucadia had completed their diligence review and continued to be willing to effect a cash merger whereby the holders of shares of Common Stock would receive $40 per share."

29. On March 14, 1986, the following item appeared at 10:41 a.m. on the Dow Jones News Service:

> "Chicago -DJ- GATX Corp. said Leucadia National Corp. has completed its 'due diligence' review of the company's records, and that the GATX Board will respond to the Leucadia acquisition proposal by March 22.
>
> "As reported, the review was a condition to Leucadia's $40-a-share proposal to acquire the GATX shares it doesn't already own.
>
> "Leucadia owns an 8.86 PC stake in GATX.
>
> "In the meantime, GATX said, it is continuing to actively pursue acquisition discussions with other interested parties.
>
> "As reported, two other companies, New York based investment firm Adler & Shaykin, and Gabelli & Co., have also made bids for GATX at $40 and $42 per share, respectively."

30. On March 24, 1986, the following item appeared at 8:55 a.m. on the Dow Jones News Service, which was also reported that day in the Wall Street Journal:

"Chicago -DJ- GATX Corp. said its board accepted a cash merger proposal from Leucadia National Corp., New York, for $544.8 million, or $40 a share.

"The Board's decision ends a three-way bidding battle for one of the nation's largest lessors of rail cars and commercial aircraft.

"This month, Gabelli & Co., a New York based investment firm, said it wanted to form a group to acquire GATX for $571 million, or $42 a share, in cash and notes. Another investment group, led by the New York investment firm Adler & Shaykin, proposed last month to buy GATX's 13.6 million outstanding shares for $40 each. All three offers are substantially above GATX's $25.41-a-share book value.

"GATX's chairman, James J. Glasser, said the Leucadia bid was 'the best offer made.'

"The merger is contingent on approval by GATX holders and Leucadia's ability to obtain financing. GATX said Leucadia submitted a letter along with its offer saying Merrill Lynch & Co. is 'highly confident' that financing can be obtained. A GATX spokesman said it is 'unlikely' that there would be any additional offers for the Company.

"According to GATX officials, Adler & Shaykin's offer was conditioned on an evaluation of GATX's financial records. After making an evaluation, Adler &

> Shaykin didn't renew its offer. Morgan Stanley & Co., GATX's investment banker, reviewed the other two offers and determined that Leucadia's was more promising, a GATX official said. He said several other potential bidders discussed possible offers, but that none made a formal offer or was able to top Leucadia's bid.
>
> "GATX extended its deadline for completing the definitive merger agreement to midnight tomorrow. The original deadline was midnight Saturday."

31. On March 26, 1986, 9:18 a.m., the Dow Jones News Wire reported that, "GATX says Leucadia not ready to enter final merger pact", saying that "it was advised by Leucadia National Corp. that Leucadia 'was not prepared to provide satisfactory assurances...of its ability to arrange financing to acquire GATX. Accordingly, GATX said, Leucadia was not prepared to enter into a definitive merger agreement.'" *** "Sources familiar with the negotiations said Leucadia estimated the amount of additional financing would exceed $50 million", approximately 10% of the $544.8 million cash acquisition offer. The item was reported the following

day by the Wall Street Journal. Leucadia's assertion that certain additional financing would be required and that therefore it needed an extension of time was based upon the claim that Leucadia suddenly discovered that the date on which some of GATX's debt would have to be paid would be accelerated if GATX were merged into another company. However, such claim by Leucadia was merely a pretext because Leucadia had long been in possession of all of GATX's debt documents and the alleged information suddenly discovered by Leucadia was not new or unusual (see, ¶s 5, 18, 19, 20, 21, 23 above and 32 below).

32. On March 27, 1986, 9:19 a.m., the Dow Jones News Wire reported that "GATX says it won't grant an extension or waiver to Leucadia National Corp. with respect to Leucadia's $40 a share bid for GATX." GATX made it quite plain that it believed that Leucadia's purported reason for seeking additional time was false, saying that "a waiver

or extension is not necessary if Leucadia wishes to arrange additional financing."

33. In truth, Leucadia never had any intention of merging or otherwise acquiring GATX, never had any intention of merging or otherwise acquiring GATX at a price equivalent to $40 per share, never had any intention of utilizing the requested extension to seek additional financing. In truth, Leucadia sought the additional extension in the hope either that another bid would surpass Leucadia's outstanding "offer" or that GATX would finally succumb to the notion of paying greenmail to Leucadia, which Leucadia had received twice before in connection with Avco Corp. in 1984 and National Intergroup, Inc. in 1985 [at a loss]. See Business Week, April 14, 1986, pp. 37-38. On October 20, 1986, Leucadia again succeeded in obtaining greenmail, this time from the Enron Corporation. See The New York Times, October 21, 1986, pD1, col. 6. Without the extension and the occurrence of one of the

two described events, Leucadia and the other defendants could not realistically dispose of their GATX shares profitably because Leucadia could not reasonably anticipate selling that number of shares into the open market at inflated prices, and, if it could, recognize that any such sales would be palpably illegal, too "raw" from a legal point of view for even its tastes.

34. On March 31, 1986, signatory defendants filed Amendment No. 7 to Schedule 13D, indicating no change in their ownership of the outstanding shares of GATX and describing the purpose of transaction as follows (Item 4. Purpose of Transaction):

> "As previously reported, on February 28, 1986, Leucadia proposed a cash merger with the Company, subject to certain conditions, pursuant to which holders of Common Stock would receive $40 per share. On that date the Beneficial Owners entered into a confidentiality agreement with the Company. The agreement contained certain standstill provisions restricting the Beneficial Owners, from, among other things, acquiring more than 20% of the Company's common stock or participating in a proxy solicitation involving the

Company for a period of two years. The agreement provided, however, that these provisions would cease to be applicable if within ten days after Leucadia had completed a diligence review and advised the Company that it was willing to proceed with the transaction, the Company did not enter into a definitive merger agreement with Leucadia.

"On March 22, 1986 the Company announced that its Board of Directors had accepted Leucadia's cash merger proposal conditioned upon final negotiation and execution of a definitive merger agreement and that the time period for entering into a difinitive merger agreement under the confidentiality agreement had been extended to midnight on March 25, 1986. On March 25, 1986, Leucadia advised the Company that it would require additional time before determining whether to proceed with the transaction and that, because it had become evident on that day that certain additional financing would be required, it requested a seven-day extension until April 1, 1986 of the time by which a definitive merger agreement would have to be entered into. On March 27, 1986, the Company announced that it would not grant Leucadia's request. The standstill provisions of the confidentiality agreement remain effective.

"The Beneficial Owners will continue to evaluate their position in light of the Company's response to Leucadia's

> request for an extension and specifically will, among other things, consider (i) whether to approach the Company with respect to a merger or other business combination on the same or revised terms; (ii) acquiring additional shares of the Company's common stock; and (iii) disposing of shares of the Company's common stock in the open market, in negotiated transactions or otherwise."

35. Defendants intentionally omitted from the foregoing Schedule 13Ds the material fact that it was the basic and primary purpose of defendants, after inflating the market price, either to sell GATX's stock back to GATX for a substantial premium above market price or to sell such stock to another bidder for GATX at a substantial premium above market price. Defendants knew that their plan and scheme could not succeed if they disclosed their true purpose in their Schedule 13Ds.

36. In addition, on or about February 18, 1986, defendant Carl Marks & Co., Inc., which directly owned a substantial number of GATX shares and which indirectly owned an additional substantial number of such shares through the various business

entitites that form the defendant network herein, filed a Schedule 14B, indicating, in essence, that they were considering whether to embark upon a proxy battle respecting GATX. The filing was made to create the impression that defendants were earnestly seeking control of GATX. In truth, the filing was made as part of the overall scheme involving all defendants to create the illusion that GATX was "in play" in the hopes that, by so doing, defendants would be able to inflate the market price for GATX stock. On March 20, 1986, defendant Carl Marks & Co., Inc., filed an Amendment No. 1 to said Schedule 14B in which they stated they were not going to go forward with a solicitation with respect to GATX.

37. In consummating their said plan and scheme, defendants made use of means or instruments of transportation or communication in interstate commerce or of the mails.

DAMAGES

38. The acts and omissions alleged herein constituted a device, scheme or artifice to defraud plaintiff and the class; a means of obtaining money by means of untrue statements of material facts and materially misleading omissions; and were transactions, practices and a course of business which operated as a fraud and deception upon plaintiff and the class in connection with the purchase and sale of securities in violation of §10 of the Exchange Act and Rule 10b-5 thereunder. Defendants intentionally omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading to plaintiff and the members of the class.

39. On March 24, 1986, the market price for GATX stock on the Exchange reached $41.38 per share. On March 26, 1986, Leucadia announced that it would need additional time to determine

whether it would proceed with its $40.00 per share acquisition of GATX. On that date, GATX closed down 1 1/4 to $37.00 per share, sinking over the next several trading days to around $35.00 per share, about a dollar more per share than the price at which GATX had traded before Leucadia filed its initial Schedule 13D.

40. Plaintiff and the class purchased their shares of GATX stock during the Class Period in the mistaken belief that the stock market prices during that period were honest and were not manipulated and inflated.

WHEREFORE, plaintiff herein, on behalf of himself and all other members of the class herein, demands judgment that the plaintiff and the members of the class herein recover against defendants, and each of them jointly and severally, damages in the dollar amount that each has suffered, plus interest, together with costs of this suit including reasonable attorneys' fees, accountants' and other

experts' fees and other disbursements as well as such other and further relief as may be just and proper.

JURY DEMAND

Plaintiff respectfully demands a trial by jury.

Dated: New York, New York
October 26, 1986

KAUFMAN MALCHMAN KAUFMANN
& KIRBY

A Member of the Firm
919 Third Avenue
New York, New York 10022
(212) 371-6000
ATTORNEYS FOR PLAINTIFF

Appendix C
Transcript of Hearing on February 20, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN STERN, on behalf of himself and all others similarly situated,

Plaintiff,

- against -

LEUCADIA NATIONAL CORPORATION, INC.,

Defendant.

---

86 Civ. 3127 (GLG)

White Plains, N.Y.
February 20, 1987
10:30 a.m.

BEFORE:

HON. GERARD L. GOETTEL,

District Judge

APPEARANCES:

KAUFMAN, MALCHMAN, KAUFMANN & KIRBY
Attorneys for Plaintiffs
ROGER KIRBY

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Defendant Carl Marks
DAVID NACHMAN

WEIL, COTSHAL & MANGES
Attorneys for Defendant Leucadia National Corporation
DENNIS BLOCK
JONATHAN HOFF

THE COURT: Proceed.

MR. BLOCK: Good morning, your Honor.

My name is Dennis Block. I'm with the firm of Weil, Gotshal & Manges. I represent the Leucadia defendants.

Your Honor will remember that in September of last year, we were all here before your Honor, and we argued.

THE COURT: Actually, you weren't here. You were in New York. But you were before me.

MR. BLOCK: That is correct. We argued a motion to dismiss, which your Honor did, in fact, end up dismissing the case. You did give the plaintiff leave to file an amended complaint.

THE COURT: I did.

MR. BLOCK: You used the word "if", if he can set forth facts which would overcome the five fatal infirmities you found in his original complaint.

I think the best way for me to proceed today is to give you a copy of the amended complaint.

THE COURT: I've looked at it yesterday.

MR. BLOCK: We have--

THE COURT: Somebody gave me an underlined copy, showing what was additional.

MR. BLOCK: Yes.

THE COURT: I read that yesterday.

MR. BLOCK: To not belabor the argument, I'll be brief and I will say simply that what we have is really more a motion to re-argue, just which was not made in a timely fashion.

There are no facts alleged which go to any of the five infirmities the Court identified. And if your Honor wishes, I would take you through--

THE COURT: He's thrown into the complaint all of the rumors on Wall Street, all of the press coverage, and all of the other things of that nature which he says indicates that other people agree with his suspicions.

MR. BLOCK: That's mere speculation and conclusory allegations which your Honor specifically

found not to be the type of fact necessary to plead fraud with particularity in this jurisdiction.

Your Honor, there are two fatal defects in the plaintiff's original complaint and amended complaint.

One is that he has not pleaded facts sufficiently to set forth the material misrepresentation. As your Honor found the first time around; the misstatement which is supposedly Leucadia's intention, we said that we had a lot of ideas and may do a lot of things. We originally made a merger proposal. And for a lot of reasons, the merger was not accomplished.

A whole bunch of facts were placed in the original complaint and, by the way, are repleaded in the complaint which your Honor found to raise facts of the opposite inference than the inference that the plaintiff had suggested.

In other words, your Honor said that the facts which were alleged gave the Court reason to believe

maybe our intent was exactly what we said, the nature of our offer was subject to financing, the fact that we had all sorts of restrictions on our ability to sell our shares. We paid a very large penalty to our investment banker if we closed on our shares. The fact that we said in all of our papers that we might sell our shares and not go with the merger, your Honor said that gave rise to the fact that we may well have intended the merger that we said we were proposing. No facts would give rise to the inference that our intent was anything other than that. Nothing has changed.

The new allegations dealing with our intent are Paragraphs 3, 33 and 5, all of which just add statutory language and garb to the complaint. There are no factual allegations, other than citations to Barron's and Fortune that somebody writing an article felt that that might have been the case: speculation.

Your Honor, the second issue, and I think even more dispositive than the first, is that your Honor found there was no reliance or causation.

With respect to the question of reliance and causation, you'll recall this plaintiff purchased his shares at $41.50 per share.

THE COURT: And your tender price was only $40.

MR. BLOCK: It wasn't a tender. It was a merger proposal was 40. And there were two other merger proposals, one by somebody that was at 42.

Your Honor found with respect to reliance and causation that there was none. There are no additional allegations regarding reliance and causation, except Paragraph 8 puts in the thought, and I quote it, that the plaintiff says he reasonably relied. That's the only addition to the complaint dealing with the question of causion and reliance.

Your Honor, that doesn't do it. As your Honor found in your original opinion, the only inferences that can be drawn from the fact that he purchased his shares at $41.50 or that he had hoped that some sort of bidding war would eventuate, and that the price would go up beyond $41.50, and that the plaintiff would make some money, that's a far cry from relying on our offer to merge at $40 per share, conditioned upon a whole bunch of conditions which I've already outlined.

There are no other additional allegations in the complaint, your Honor. We have asked, not only that you dismiss the case, again on the same basis you dismissed it before, but that sanctions be applied here pursuant to Rule 11, because the complaint was frivolous in the first case, and because your Honor had given the plaintiff the opportunity to replead, provided if he could show real facts or plead real facts which would give rise to an appropriate inference of fraud.

Fraud, as your Honor has found in other cases and in this case, is a very serious allegation, especially against institutions that are in the marketplace from time to time.

The cost of both the motion to dismiss originally and our motion to dismiss a second time should be compensated pursuant to Rule 11.

Thank you, your Honor.

MR. NACHMAN: Your Honor, David Nachman from Paul, Weiss, here on behalf of Defendant Carl Marks.

As to Carl Marks, it is indeed true that the only thing that has changed is the site of the courtroom. There is not one new material allegation in the complaint with respect to Carl Marks.

THE COURT: He had an even weaker defense than against Leucadia.

MR. NACHMAN: Considerably. And he weakened his case further, as the Court pointed out in the early opinion. The direct ownership

interest that Carl Marks had in GATX rebutted the speculative inference that its 14(b) filing had anything to do with this allegedly improper scheme.

Rather than take heed of the Court's decision, plaintiff simply has parodied the very fact which the Court found against, sustaining the claim into its complaint, and somehow thinks that makes a difference. But it doesn't.

We submit that the only issue was entered for the Court on Carl Marks' motion is the Rule 11 motion. This is somewhat akin to dealing with one of those computers that has gone haywire. When you send a letter to the phone company saying you paid the bill, and they send you a letter saying you haven't, and you tell them you have paid the bill, and the computer doesn't listen to you. That is what we have been dealing with, with this plaintiff. He has a word processor, and he spits out the same complaint, spits it out again. We point it out in the brief, and he spits out an identical brief in response to the points that we've made.

There is no justification for bringing us in here in the first place. Certainly no justification for bringing us in, in the second place. He had the right to seek an appeal, if he disagreed with your Honor's first ruling. He still has that right. But we respectfully submit that the costs attendant to having to come down here, to having to answer to these meritless charges, should be assessed against the plaintiff and his counsel, and that we should get full fees, not only for the second time, but for the first time, because it is abundantly clear by this time that there were never facts, never any facts against Carl Marks, and Carl Marks should never have been sued.

THE COURT: Mr. Kirby.

MR. KIRBY: Well, your Honor, the defendants are again trying to argue a motion for summary judgment, rather than a motion to dismiss.

The defendants in the papers do not maintain that the allegations, if actually accepted as true,

do not amount to a cause of action. Instead, what the defendants are doing is asking this Court to weigh the evidence based on a complaint brought by a plaintiff who does not have access to the documents or to the witnesses that are exclusively in the possession of the defendants.

Now, the Second Circuit has, through a number of cases, specifically instructed that in situations like this, motions to dismiss are not to be granted, because, in the first place, it would be a fundamental denial of due process when one of the parties has access to all the evidence and the other party has none.

Moreover, the Court has been instructed, district courts have been instructed, by the Second Circuit that a number of cases, including Goldman at 754 F2d 1067, not to weigh the evidence on a motion to dismiss, and that includes not making determinations about materiality. Materiality is not supposed to be an issue in a Rule 12 motion,

because materiality entails the question of fact and, thus, a finding of fact.

THE COURT: I think you told me all these things a few months ago. And the bottom line comes down to the fact that you claim your client was relying on a possible $40 price tendered by the Leucadia people, and he bought at $41.50, which is a dollar and a half more than the price would have been, had it gone forward at a time when there were other possible contestants out there talking about higher figures. And how do you make any causality out of that?

MR. KIRBY: Well, first, let me say that the argument respecting reliance--

Let me back up a second.

THE COURT: We are not talking about reliance. We're talking about causality.

MR. KIRBY: I'll get to that in a moment. but I think that this motion to dismiss is really a motion for summary judgment in disguise.

I think the arguments respecting causation have to do with damage analysis at trial. The fact is that the defendants' purported interest in GATX prompted that stock to rise from 35 to around 38, 39. And then, the existence of that offer, while the other couple of offers were out there, caused the stock to go up beyond the $40.

The law is fairly clear in these kinds of cases that even if these defendants were responsible only for four or five dollars of the $41 price, they've got to pay that amount. And in reality, they will probably be obliged to pay the whole amount, because it was their purpose, we say, say, -- and I think we can establish this to the trier of fact -- that other people would come into the marketplace and drive the price up beyond $40 a share. Thus, the defendants initial bid or expression of interest in GATX caused the price to rise by ten or eleven percent on the very first day and caused the price to stay up beyond the price at which it traded before the bid was extant and after it was withdrawn.

We have a case here, unlike a lot of these cases, where it looks like one of the parties to the proceeding is going to say that, from their point of view, the Leucadia bid was frivolous, was not a bona fide bid, because, according to Barron's, which is not really speculating, but reporting GATX statements, GATX believed that Leucadia had in its possession the information that it needed respecting the amount of money needed to acquire the money two months before Leucadia asked for an additional week.

The request for an additional week was, it seems to me, and also to GATX and also to other professionals who are quoted by Barron's, done not in good faith, but in the hope that at the last moment, some other bidder would come in and take Leucadia off the financial hook.

That didn't happen. Leucadia didn't make the money that it hoped to. But its making money or not making money is completely beside the legal point.

As to Carl Marks, we have alleged had a direct and indirect financial interest in the transaction. Carl Marks is, through a series of companies, directly interested in the matters at hand. And it is, I think, naive to suppose at this point that there is no reasonable basis for assuming the Carl Marks' actions as an independent operator were independent of its actions as a participant.

And we don't have access to discovery at this point. All we do have is that Carl Marks took a number of steps that seemed to help to persuade the public that Leucadia's bid was meant to be a serious bid, and that because of Carl Marks' substantial and indirect financial interest in the matter, it's reasonable to suppose that there was a connection, and that there was an intentional action in concert. And I don't think that we have to go far beyond the scandals that are appearing in the various papers today, to see that there are a lot of conspiracies afoot, that I think surprise many

of us in their extent. And I don't think the allegations respecting Carl Marks' affiliation with Leucadia are the least bit surprising or require anybody to stretch the imagination or not. They were a direct participant and they were an indirect participant. And they undoubtedly used their direct participation to implement their indirect participation and vice versa.

THE COURT: Do you wish to address yourself to Rule 11?

MR. KIRBY: No, I did that in the brief.

THE COURT: Right now, orally.

MR. KIRBY: No.

THE COURT: Okay. I have heard enough.

This is not truly a new motion. It basically comes down to a re-argument of the prior complaint and decision. The additional facts which have been put into the complaint are rumors and reports of various financial periodicals.

It is true that in some instance, they're reporting statements made by GATX, but we knew about them the first time around.

I grant the motion to dismiss. I rest it primarily on the original opinion; indeed, entirely on the original opinion.

I recognize that these are not good times for arbitrageus. They have lost certain of their sources of insider information. They are confronted with poison pills. A lot of tenders and mergers don't go through, which makes arbitrageuring much more risky than it used to be.

But I do not believe that this sort of action can guarantee them recovery, regardless of whether or not the deal ultimately closes.

There is simply a total lack of any causality between the actions of the plaintiff, who was basing his bid on a price higher than that put forth by the defendants, on the assumption that a bidding war would continue and the price would be driven

up even higher, and he would make money out of it.

That is not a securities fraud claim. And based on the earlier decision, I grant the motion to dismiss now.

With respect to Rule 11, the teaching of the Second Circuit is that we should not discourage creativity. Mr. Kirby is a very creative person. The first complaint here was quite creative. It didn't march with me, but there are certain judges in the Second Circuit who would see it as being a possible securities fraud claim. And he may ultimately prevail on appeal.

However, the refiling of the complaint, rather than simply appealing the earlier dismissal, was repetitious. I don't know that we have to put up with repetition, and consequently, I grant Rule 11 sanctions as to the costs for making the second motion to dismiss, but only the second motion.

Judgment will enter accordingly.

MR. KIRBY: Thank you, Judge.

MR. BLOCK: Thank you, your Honor.

Appendix D
Endorsement Order Dated February 20, 1987

ENDORSEMENT

Re: Jonathan Stern, etc. v. Leucadia National Corporation, et al., 86 Civ. 3127 (GLG)

Defendants' motion to dismiss the amended complaint is granted. Request for Rule 11 sanctions is granted as to costs of the instant motion.

SO ORDERED.

Dated: White Plains, N.Y.
February 20, 1987

GERARD L. GOETTEL
U.S.D.J.

Appendix E
Opinion of Affirmance of the Court of Appeals

Jonathan STERN, on behalf of himself and all others similarly situated, Plaintiff–Appellant,

v.

LEUCADIA NATIONAL CORPORATION, LNC Investments, Inc., Charter National Life Insurance Company, American Investment Company, Leucadia Inc., Uintah National Corp., TLC Associates, Carl Marks & Co., Inc., Ian N. Cumming, Joseph S. Steinberg, Cumberg, Inc., Marks Investing Corp. and S & S Securities, Inc., Defendants–Appellees.

No. 1214, Docket 87–7211.

United States Court of Appeals,
Second Circuit.

Argued June 8, 1987.

Decided April 20, 1988.

Roger W. Kirby, New York City (Kaufman Malchman Kaufmann & Kirby, New York City, of counsel), for plaintiff-appellant.

Dennis J. Block, New York City (Jonathan M. Hoff, Donald E. McKnight, Jr., Weil, Gotshal & Manges, New York City, of counsel), for defendants-appellees Leucadia Nat. Corp., LNC Investments, Inc., Charter Nat. Life Ins. Co., American Inv. Co., Leucadia, Inc., Uintah Nat. Corp., TLC Associates, Carl Marks & Co., Inc., Ian N. Cumming, Joseph S. Steinberg, Cumberg, Inc., Marks Investing Corp., and S & S Securities, Inc.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for defendant-appellee Carl Marks & Co., Inc.

Before KEARSE, ALTIMARI and MAHONEY, Circuit Judges.

MAHONEY, Circuit Judge:

Jonathan Stern brought this action on behalf of himself and a class of investors who purchased common stock of the GATX Corporation ("GATX") between January 9, 1986 and March 26, 1986, inclusive. Stern complained that defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982) ("Section 10(b)"), and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5 (1987) ("Rule 10b–5"), by leading the investing public to believe that defendant Leucadia National

Corporation ("Leucadia National") would merge with GATX, when in fact defendants sought only to inflate artificially the market price of GATX common stock, and thereafter to sell off their shares at a substantial profit.

Defendants moved to dismiss the complaint pursuant to Fed.R.Civ.P. 9(b) and 12(b)(6). The United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, granted the motion, according plaintiff leave to replead within twenty days. *Stern v. Leucadia Nat'l Corp.*, 644 F.Supp. 1108 (S.D.N.Y. 1986). Upon the filing of the amended complaint, defendants moved to dismiss on the same grounds as before; in addition, defendants requested that sanctions be awarded under Fed.R.Civ.P. 11. By endorsement, the district court granted defendants' second motion to dismiss and awarded Rule 11 sanctions with respect to that motion.

Stern appeals. We affirm as to the dismissal, and reverse as to the sanctions.

I. BACKGROUND

Except for the allegations pertaining to Jonathan Stern and his counsel, plaintiff's amended complaint is pleaded entirely upon

information and belief. In view of our disposition of this appeal, we assume the truth of his allegations. *See DiVittorio v. Equidyne Extractive Indus. Inc.*, 822 F.2d 1242, 1244, 1247 (2d Cir.1987), and cases there cited.[1]

A. *The Defendants.*

Stern alleges that defendants Ian N. Cumming and Joseph S. Steinberg control an interlocking network consisting of the corporate defendants, as follows. Cumming, Steinberg, Marks Investing Corp. ("MIC") and S & S Securities, Inc. ("S & S") are the owners of Cumberg, Inc. ("Cumberg"). Cumberg, Cumming and Steinberg own TLC Associates ("TLC"), a New York general partnership. In turn,

1. We note in this regard that the district court's dismissal of the amended complaint placed no reliance on the fact that virtually all of plaintiff's allegations were stated upon information and belief, nor do appellees urge the point here. The general rule (with certain exceptions), however, which we discuss in more detail hereinafter, is that fraud allegations premised upon information and belief do not satisfy Rule 9(b). Our consideration of appellant's claims on the merits under the circumstances of this appeal should not be construed to undermine that general rule, or to condone the practice of pleading virtually an entire fraud complaint upon information and belief.

TLC owns all of the outstanding shares of defendant Uintah National Corporation ("Uintah"), which owns 48% of the outstanding shares of Leucadia National, which owns all of the outstanding shares of Leucadia Inc. ("Leucadia"), which owns all of the outstanding shares of LNC Investments, Inc. ("LNC") and 94% of the outstanding shares of defendant American Investment Company ("AIC"), which owns all of the outstanding shares of defendant Charter National Life Insurance Company ("Charter"). Cumming, Steinberg and Leucadia own more than half of MIC's outstanding shares; Cumming and Steinberg own an unspecified percentage of S & S' shares; and defendant Carl Marks & Co., Inc. ("Carl Marks") owns an unspecified portion of MIC.

Stern alleges that defendants conspired with, and aided and abetted, one another in violating Section 10(b) and Rule 10b–5, and that Leucadia National, Cumming and Steinberg were each a controlling person of each of the other defendants (except possibly Carl Marks) within the meaning of Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a) (1982).

B. *The Allegations of the Amended Complaint.*

In light of our view of the noncompliance of plaintiff's amended complaint with Fed. R.Civ.P. 9(b), it is appropriate to outline the allegations of that complaint in some detail. That outline follows.

The Events

On January 9, 1986, Leucadia National, LNC, AIC, Charter, LI, Uintah and TLC (collectively the "Leucadia group") filed a Schedule 13D statement [2] with the Securities and Exchange Commission reporting that they had purchased, or had acquired options to purchase, 5.26% of GATX's outstanding shares. The statement indicated that the Leucadia group deemed GATX's common stock undervalued, and might seek control of GATX. Preliminary to any such determination, the group stated it might

2. 17 C.F.R. § 240.13d-1 (1987) requires the filing of a statement with the Securities and Exchange Commission, *inter alia*, by any person acquiring more than five percent beneficial ownership of certain classes of equity securities, which statement must contain the information specified in 17 C.F.R. § 240.13d-101 (1987), which consists of Schedule 13D and related instructions. Material changes in the facts set forth in the original statement must be reported promptly. 17 C.F.R. § 240.13d-2(a) (1987).

explore the feasibility of various strategies for gaining control. including: (1) merger; (2) acquisition of additional GATX common or preferred stock (subject to its availability at favorable prices and the availability of any requisite financing) in open market or privately negotiated purchases, by tender offer, or otherwise; (3) solicitation of proxies to elect its nominees as directors of GATX; or (4) joining forces with interested third parties to obtain control of GATX. The group noted that, depending upon the course it chose, it might dispose of shares of GATX common stock in the open market, in privately negotiated transactions, or otherwise. The statement cautioned, however, "that the possible activities of [the Leucadia group] are subject to change at any time and there is no assurance that [it] will actually purchase any additional shares of the Common Stock or any shares of preferred stock or seek to influence or obtain control of [GATX]." The same day, the Dow Jones News Service ("DJNS") reported the Leucadia group's stake in GATX and its plans with respect thereto as described above. On January 10, GATX common closed at $38½ on the New York Stock Exchange ("NYSE"), up $3⅝ from its closing price the day before.

On January 30, 1986, the Leucadia group filed the first of seven amendments to the Schedule 130 statement, noting that, through the purchase of stock and options, it had increased its stake in GATX to 6.3% of the latter's outstanding shares, and stating that it was "exploring the possibility of acquiring certain of [GATX's] assets...." The amendment further reported that in connection with this exploration, the Leucadia group had entered into a confidentiality/standstill agreement with GATX on January 28 pursuant to which GATX provided certain confidential information to Leucadia; in return, the group was to freeze its stake in GATX and refrain from acquiring any additional GATX stock or acting in concert with any third party to acquire voting securities or control of GATX from the date of the agreement until twenty-four hours following destruction or return of the information furnished to the Leucadia group pursuant to the agreement.

The second amendment to the Schedule 13D statement was filed on February 3,[3] reporting that the Leucadia group's stake in GATX had not changed, but it had de-

3. The original and amended complaints both allege this date of filing, but the amendment recites as a *past* event the return of the confidential information on February 6.

stroyed or returned all information furnished under the confidentiality/standstill agreement on February 6, thus terminating its obligations thereunder as of February 7.

Amendment number three, filed February 12, announced that the Leucadia group had on February 11 proposed a cash merger wirh GATX pursuant to which the latter's common stockholders would receive at least $38 per share. The group also announced that, in the alternative, it was prepared to discuss a transaction whereby GATX would distribute its capital equipment leasing business to its shareholders and the cash merger price would be reduced by an agreed amount. The amendment stated that consummation of the transaction "would be subject to negotiation, preparation and execution of a definitive merger agreement, the requisite regulatory approvals, satisfactory completion by Leucadia of diligence (which it would be prepared to commence promptly) and Leucadia [National's] arrangement of requisite financing." GATX responded on February 13, that it would consider any "specific bona fide proposal" made by the Leucadia group, and would provide the group with non-public information concerning GATX subject to a confidentiality agreement.

The Leucadia group filed the fourth amendment to its Schedule 13D statement on February 25, announcing that it owned 8.86% of GATX's outstanding shares. Three days later, DJNS reported that Leucadia National had raised its bid for GATX to $40 per share and that Merrill Lynch Capital Markets ("Merrill Lynch"), retained by Leucadia National as its financial advisor to assist in obtaining the necessary financing for the $40 per share bid, was "highly confident" that it could obtain the requisite financing. DJNS also reported that GATX had announced another $40 per share offer from a third party, and a "conditional" offer of $42 per share in cash and notes from still another third party.

Amendment number five to the Schedule 13D statement, filed on March 4, 1986, indicated no change in Leucadia's ownership of GATX's outstanding shares. It reported, however, the increase in the proposed merger price to $40. Again, the Leucadia group stated that consummation of its cash merger proposal was subject to the conditions previously stated in Amendment No. 3, to which was added the approval of GATX's shareholders. Amendment No. 5 also announced the retention of Merrill Lynch as the Leucadia's group financial advisor, and quoted Merrill Lynch's

"high[ ] confiden[ce]" in its ability to obtain the necessary financing for the merger. The Leucadia group also disclosed that it had entered into another confidentiality agreement with GATX dated February 28, 1986, pursuant to which GATX was to provide the group with certain confidential information, and the group was to refrain for two years from acquiring more than twenty percent of GATX's outstanding common stock, proposing a business combination transaction relating to GATX (unless invited to do so by GATX), soliciting any GATX proxies, or acting in concert with any third party with respect to an acquisition of GATX, its securities or its assets, or to the holding, voting or disposition of GATX's securities. The amendment further stated that the agreement called for completion of the Leucadia group's due diligence review no later than March 29, 1986, and provided that the foregoing restrictions would terminate if GATX failed to enter into a definitive merger agreement with Leucadia within ten days after Leucadia completed its due diligence review and advised GATX of its continued willingness to consummate the merger. Finally, Amendment No. 5 reported that Leucadia had committed to pay Merrill Lynch a "transaction fee not to exceed $400,000" if,

prior to March 1, 1987, the Leucadia group received consideration for at least 51% of its holdings of GATX common stock.

On March 14, 1986, the Leucadia group filed the sixth amendment to its Schedule 13D statement reporting that two days earlier, Leucadia National had notified GATX of the completion of Leucadia National's diligence review and its continued willingness to consummate a cash merger at $40 per share. That same day, DJNS reported that GATX would respond to Leucadia's merger proposal by March 22. "In the meantime," according to the DJNS report, GATX would continue "to actively pursue acquisition discussions with other interested parties."

On March 24, DJNS and the *Wall Street Journal* reported GATX's acceptance of Leucadia's cash merger proposal. The reports repeated that the merger was contingent on GATX shareholder approval and Leucadia's ability to obtain financing, and that Merrill Lynch was "highly confident" that the necessary financing could be obtained. According to the reports, the deadline for completing the definitive merger agreement was midnight on March 25, 1986.

On March 31, 1986, the Leucadia group filed the seventh and last amendment to its Schedule 13D statement, disclosing information which had already been reported by DJNS and the *Wall Street Journal* on March 26 and 27. The amendment stated that on March 25, Leucadia National had advised GATX that Leucadia National would require additional time to determine whether to proceed with the transaction because it had become evident that day that certain additional financing would be required; that Leucadia National had requested a seven day extension for consummation of a definite merger agreement; that GATX had refused that request on March 27; and that the Leucadia group would continue to evaluate the situation, and would specifically consider making another merger proposal to GATX, acquiring additional GATX common stock, or disposing of its holdings of GATX common stock.

Leucadia National stated that its need for additional financing and time arose from its sudden discovery, on March 25, that a merger with GATX would trigger a requirement that some of the latter's debt be paid on an accelerated basis.

The Allegations of Fraud

Plaintiff claims, however, that Leucadia never intended to merge with or otherwise acquire GATX, and never intended to seek additional financing during the requested extension. Plaintiff maintains that Leucadia's eleventh-hour discovery that additional financing would be necessary was "merely a pretext because Leucadia had long been in possession of all of GATX's debt documents and the alleged information suddenly discovered by Leucadia was not new or unusual...."

Plaintiff also alleges that on or about February 18, 1986, Carl Marks, a direct and indirect owner of a significant number of GATX shares, filed a Schedule 14B statement [4] with the Securities and Exchange Commission which indicated that Carl Marks was considering a proxy contest respecting GATX. On March 20, Carl Marks

4. 17 C.F.R. § 240.14a–11(c) (1987) requires that each participant in a proxy solicitation subject to section 240.14a–11 (relating to proxy contests) file a statement with the Securities and Exchange Commission, *inter alia*, containing the information specified by Schedule 14B, which in turn is set forth in 17 C.F.R. § 240.14a–102 (1987). Material changes in the facts set forth in the original statement must be reported promptly. 17 C.F.R. § 240.14a–11(c)(5) (1987).

filed an amendment to the Schedule 14B statement indicating it would not go forward with such a solicitation. Plaintiff alleges that these filings were a bogus device "to create the impression that defendants were earnestly seeking control of GATX."

Stern alleges that the defendants conspired, and aided and abetted one another, to create the impression, via their filings, that GATX was genuinely "in play," when in fact defendants intended only to inflate the market price of GATX's stock, and thereafter to extract greenmail from GATX or sell their holdings to another bidder for GATX at a premium. Thus, according to plaintiffs, defendants violated Section 10(b) and Rule 10b–5 because their filings, replete with material misstatements and omissions, led "the reasonable investor to believe that, subject to certain essentially mechanical conditions, defendants would seek to merge with GATX when in truth defendants had no genuine intention of carrying out the merger even were the announced conditions were [sic] met."

Plaintiff purchased his shares of GATX on March 3, 1986 at $41.50 per share. He sold his shares for $35.25 on April 8, 1986.

C. *Action by the District Court.*

The district court dismissed Stern's original complaint, finding that it failed adequately to allege "the element of material representation or omission, and the element of reliance and causation," 644 F.Supp. at 1111, with respect to the Leucadia group; that the claim against the other defendants (with the exception of Carl Marks) rested "solely upon the vague allegation that they either control or are part of an interlocking network of corporations affecting the management of the signing defendants," 644 F.Supp. at 1112; and, as to Carl Marks, that plaintiff failed to allege facts indicating that Carl Marks' Schedule 14B filings "contained false or misleading material facts," or that Carl Marks conspired with, or aided or abetted, the other defendants, 644 F.Supp. at 1112.

The district court granted leave to amend within twenty days, "if such repleading can allege sufficient facts" in support of Stern's allegations. 644 F.Supp. at 1112. Plaintiff filed his amended complaint, which was very similar to the first, but contained some new matter, consisting essentially of (1) further elaboration concerning the alleged purpose of defendants' statements and omissions; (2) summaries

and quotations of news reports and commentaries concerning defendants' bid for GATX, some of which referred to other occasions on which Leucadia National had assertedly received greenmail from corporate targets; (3) allegations that the Leucadia group had long known, because of its possession of the relevant GATX documents, that the accelerated payment of certain GATX debt would be required as a result of the merger, and its request for additional time to arrange financing was accordingly a pretext; and (4) an allegation concerning the increase in the price of GATX's common stock as a result of the initial filing of the Leucadia group's Schedule 13D statement.

Defendants renewed their motions to dismiss and requested sanctions. At the hearing on this motion, Judge Goettel announced that he would grant the motion to dismiss "entirely on the original opinion" and, deeming the amended complaint "repetitious", would "grant Rule 11 sanctions as to the costs for making the second motion to dismiss, but only the second motion." A corresponding endorsement was then entered. Upon application, Rule 11 sanctions

were awarded in the amount of $7,500.00 for legal fees.

This appeal followed.

II. DISCUSSION

On appeal, Stern contends that the district court's Rule 12(b)(6) ruling improperly implicated factual issues more appropriately resolved on the merits by the trier of fact; that the complaint complied with Rule 9(b); and that sanctions were improperly imposed. We need address only the latter two contentions.

A. *The Sufficiency of the Complaint under Rule 9(b).*

As this court has recently observed, Fed. R.Civ.P. 9(b) is designed to further three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of a defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits. *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987) (citing *Reingold v. Deloitte Haskins & Sells*, 599 F.Supp. 1241, 1266 (S.D.N.Y.1984)); *see also* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1296, at 399–400 (1969 & Supp.1987).

The Rule 9(b) balance has been struck in a number of ways. Thus, fraud pleadings generally cannot be based on information and belief. *DiVittorio*, 822 F.2d at 1247; *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir.1972). On the other hand, fraud allegations may be so pleaded as to facts peculiarly within the opposing party's knowledge; even then, however, the allegations must be accompanied by a statement of facts upon which the belief is founded. *See Luce v. Edelstein*, 802 F.2d 49, 54 n. 1 (2d Cir.1986); *Schlick v. Penn–Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975); *Segal v. Gordon*, 467 F.2d at 608; *Equitable Life Assurance Soc'y v. Alexander Grant & Co.*, 627 F.Supp. 1023, 1029 (S.D.N.Y.1985); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1298, at 416 (1969). *See also Devaney v. Chester*, 813 F.2d 566, 568 (2d Cir.1987); *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961–62 (2d Cir. 1987). Further, Rule 9(b) permits "[m]alice, intent, knowledge, and other condition of mind" to be "averred generally." In this regard, we have noted that it would be unworkable and unfair to require great specificity in pleading scienter, since "a plaintiff realistically cannot be expected to

plead a defendant's actual state of mind." *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d at 962 (citing *Ross v. A.H. Robins Co.*, 607 F.2d 545, 558 (2d Cir.1979), *cert. denied*, 446 U.S. 946, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980)); *see also Goldman v. Belden*, 754 F.2d 1059, 1070 (2d Cir.1985); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1301, at 426 (1969). Nonetheless, circumstances must be pleaded that provide a factual foundation for otherwise conclusory allegations of scienter. *See, e.g., Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d at 962; *Ross v. A.H. Robins Co.*, 607 F.2d at 558.

Judged by these standards, we have no difficulty agreeing with the court below that Stern's amended complaint does not pass muster under Rule 9(b). It contains little by way of embellishment of the bald allegation that "Leucadia never had any intention of merging or otherwise acquiring GATX, never had any intention of merging or otherwise acquiring GATX at a price equivalent to $40 per share, [and] never had any intention of utilizing the requested extension to seek additional financing." It is not enough to quote press speculation about defendants' motives and press reports of other occasions on which Leucadia National assertedly obtained

greenmail from other corporate targets. Nor does it suffice to assert conclusory suspicions as to defendants' motives based solely upon the fact that they had GATX's loan agreements for a considerable period of time before concluding that certain of their provisions would require additional financing for the proposed merger. Such allegations simply do not provide the "specific, well-pleaded facts" upon which Judge Goettel correctly insisted in offering plaintiff an opportunity to replead its complaint. *See* 644 F.Supp. at 1112.

As the district court pointed out, furthermore, many of Stern's allegations undercut his claim of fraud. For example, (1) the Leucadia group's Schedule 13D statements were all conditional; (2) the earlier filings indicated that Leucadia might dispose of its stock instead of attempting to gain control of GATX; (3) later filings noted that Leucadia National cash merger proposal depended upon, *inter alia*, arrangement of financing and acquisition of shareholder approval; and (4) Leucadia National agreed to pay Merrill Lynch a substantial fee if it sold more than 51% of its holdings in GATX. *See generally* 644 F.Supp. at 1111. Finally, Leucadia National never called off the merger; it asked GATX for a brief

extension of time to obtain additional financing, which GATX declined to provide.

We conclude that the district court correctly dismissed plaintiff's amended complaint for failure to comply with Fed.R. Civ.P. 9(b).

B. *The Award of Sanctions.*

Since we are not concerned with the specifics of the district court's award, the scope of our review is not confined by the abuse of discretion standard. *See Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 122 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n. 7 (2d Cir. 1985). Rather, "[w]here the only question on appeal becomes whether, in fact, a pleading was groundless [or, for purposes of this case, made no serious effort to satisfy Rule 9(b)], we are in as good a position to determine the answer and, thus, we need not defer to the lower court's opinion." *Eastway*, 762 F.2d at 254 n. 7.

We have two difficulties with the district court's imposition of sanctions. First, a dismissal with leave to replead is not a final order that is immediately appeal-

able. *Blanco v. United States*, 775 F.2d 53, 56 (2d Cir.1985); *Cory Bros. & Co. v. United States*, 47 F.2d 607 (2d Cir.1931); *see* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.08[1], at 115 n. 27 (2d ed. 1987). In order to appeal, the plaintiff would have to forego the leave to replead granted him, either by allowing the deadline for repleading to pass or by having the court revoke that leave and enter a final judgment. We disagree with the suggestion that a plaintiff should be penalized for taking the option given him by the court to attempt to replead in a way designed to cure flaws found in his complaint by the court.

Second, since leave to replead was granted for the purpose of adding factual matter in an effort to comply with Rule 9(b), sanctions should not have been granted simply because the amended complaint was "repetitious." Where a party's complaint has been dismissed for failure adequately to set forth an element of his claim, and he has been given leave to replead in an effort to cure the deficiency, it is to be expected that the amended complaint will repeat the other allegations found in the original complaint. Indeed, without repetition of many of the original

allegations, the amended complaint would fail to state a claim even if the original defect were cured.

The plaintiff here did not simply refile the original complaint unchanged. Thus, instead of focusing on the original allegations, the district court should have focused on whether the new allegations met the standards we have fashioned with respect to Rule 11.

Following its dismissal of Stern's original complaint, the district court granted leave to replead "if such repleading can allege sufficient facts upon which the allegations rest." 644 F.Supp. at 1112. Plaintiff's amended complaint set forth very little in the way of additional facts to support his claim of securities fraud.[5] The district court accordingly stated, at the hearing on the motion to dismiss the amended complaint:

> With respect to Rule 11, the teaching of the Second Circuit is that we should not discourage creativity. Mr. Kirby is a very creative person. The first complaint here was quite creative. It didn't march with me, but there are certain judges in the Second Circuit who would

5. The additions are summarized *supra* at section I(C) of this opinion.

see it as being a possible securities fraud claim. And he may ultimately prevail on appeal.

However, the refiling of the complaint, rather than simply appealing the earlier dismissal, was repetitious. I don't know that we have to put up with repetition, and consequently, I grant Rule 11 sanctions as to the costs for making the second motion to dismiss, but only the second motion.

We are persuaded that the district court erred in awarding sanctions. As this court has previously noted, sanctions shall be imposed "when it appears that a pleading has been interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (emphasis in original). We pointed out that our Rule 11 standard is not intended to cast a pall on attorney originality and creativity. Rather, it is targeted at situations "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where

no reasonable argument can be advanced to extend, modify or reverse the law as it stands...." *Id.* We stressed that "any and all doubts must be resolved in favor of the signer." *Id.*

Here, plaintiff was specifically given leave to replead. While it is true that he was given leave to do so "if" he could allege sufficient facts to support his allegations, his failure to plead his cause in compliance with Rule 9(b), which, as this case demonstrates, requires more of the pleader than is generally mandated by the federal rules,[6] should not precipitate an award of sanctions absent patently inadequate claims or unreasonable contentions. *Eastway*, 762 F.2d at 254. Such circumstances are not present here.

It is evident that plaintiff attempted to assert additional facts, including the existence of published reports of prior occasions on which Leucadia National had allegedly engaged in greenmail, in order to support the allegation that Leucadia's intentions were contrary to its representations made in public filings. Several new paragraphs were added, as discussed in part I(C) above.

6. *Cf.* Fed.R.Civ.P. 8(a)(2), calling for "a short and plain statement of the claim showing that the pleader is entitled to relief...."

Despite our agreement with the district court that the new material was insufficient to satisfy Rule 9(b), we are unable to conclude that it was patently clear that there was absolutely no chance that the new material could cure the defect.

We have carefully reviewed the cases cited to us by appellees on this issue. Some involved warnings that sanctions might be imposed in the future if the adjudicated claims were reasserted. *E.g., Zerman v. Melton*, 735 F.2d 751 (2d Cir.1984) (per curiam), *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 111 (1985); *Black v. Niagara Mohawk Power Corp.*, 641 F.Supp. 799 (N.D.N.Y.1986). *Cf. Equitable Life Assurance Soc'y v. Alexander Grant & Co.*, 627 F.Supp. 1023, 1033 (S.D.N.Y. 1985) (complaint dismissed without award of Rule 11 sanctions, plaintiff warned to "carefully consider its duty under Rule 11" if it chooses to file amended complaint). Others involved histories of repetitive and vexacious litigation far more aggravated than any presented here. *E.g., Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.) (injunction against further litigation), *cert. denied*, — U.S. ——, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986); *United States v.*

Carley, 783 F.2d 341 (2d Cir.), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2251, 90 L.Ed.2d 697 (1986); *Johnson v. New York City Transit Auth.*, 639 F.Supp. 887 (E.D.N.Y. 1986), *aff'd in part and vacated in part*, 823 F.2d 31 (2d Cir.1987); *Cavallary v. Lakewood Sky Diving Center*, 623 F.Supp. 242 (S.D.N.Y.1985); *Andre v. Merrill Lynch Ready Assets Trust*, 97 F.R.D. 699 (S.D.N.Y.1983). *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 611 F.Supp. 281 (S.D.N.Y.1985), imposed sanctions for the filing of a motion to dismiss which was completely duplicative of a simultaneously filed motion to reargue. In *Angrisani v. City of New York*, 639 F.Supp. 1326 (E.D.N.Y.1986), plaintiff was required to pay a $300 sanction as a condition of filing a *third* amended complaint.

We find none of these authorities persuasive that sanctions are appropriate on this record. Plaintiff and his counsel did not reach the point of clear abuse at which sanctions are appropriate, especially since "any and all doubts must be resolved in [their] favor." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985).

III. CONCLUSION

The order of the district court is affirmed as to the dismissal of the amended complaint, and reversed as to the imposition of sanctions. The parties shall bear their own costs.

Appendix F
Rule 9(b) of the Federal Rules of Civil Procedure

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(2)

No. 88-116

FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONATHAN STERN,

Petitioner,

— against —

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DENNIS J. BLOCK
WEIL, GOTSHAL & MANGES
Attorneys for Respondents
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

QUESTIONS PRESENTED

1. Whether a complaint meets the requirements of Rule 9(b) that "the circumstances constituting fraud or mistake shall be stated with particularity" where (1) the allegations of fraud are made entirely on information and belief; (2) the allegations contain no statement of facts supporting the basis upon which the belief is founded; and (3) the complaint sets forth neutral facts that the defendants made certain statements and then simply concludes that the statements were false?

2. Whether the United States Supreme Court should function as a court of appeals in the context of reversing the decisions of two lower courts dismissing a complaint based upon failure to comply with basic pleading requirements of the Federal Rules of Civil Procedure utilizing a standard upon which there is no conflict among the circuits?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	7
The decision below correctly applied rule 9(b) and is consistent with courts in other circuits	7
CONCLUSION	12
APPENDIX	13

TABLE OF AUTHORITIES

Cases:	Page
Arpet, Ltd. v. *Homans*, 390 F. Supp. 908 (W.D. Pa. 1975)	9
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	9, 12
Decker v. *Massey-Ferguson, Ltd.*, 681 F.2d 111 (2d Cir. 1982)	8, 12
Denny v. *Barber*, 576 F.2d 465 (2d Cir. 1978)	9, 10
DiVittorio v. *Equidyne Extractive Industries, Inc.*, 822 F.2d 1242 (2d Cir. 1987)	9
Duane v. *Altenburg*, 297 F.2d 515 (7th Cir. 1962)	8, 9, 11
Elster v. *Alexander*, 75 F.R.D. 458 (N.D. Ga. 1977)	9
Friedlander v. *Nims*, 755 F.2d 810 (11th Cir. 1985)	9
Hayduk v. *Lanna*, 775 F.2d 441 (1st Cir. 1985)	9, 11
Kellman v. *ICS, Inc.*, 447 F.2d 1305 (6th Cir. 1971)	8
O'Neill v. *Maytag*, 339 F.2d 764 (2d Cir. 1964)	8
Robison v. *Caster*, 356 F.2d 924 (7th Cir. 1966)	8
Segal v. *Gordon*, 467 F.2d 602 (2d Cir. 1972)	8, 9
Semegen v. *Weidner*, 780 F.2d 727 (9th Cir. 1985)	8, 11
Shemtob v. *Shearson, Hammill & Co.*, 448 F.2d 442 (2d Cir. 1971)	8, 11

Page

Skycom Corp. v. *Telstar Corp.*, 813 F.2d 810 (7th Cir. 1987) 8

Stern v. *Leucadia National Corp.*, 844 F.2d 997 (2d Cir. 1988) 8

Walling v. *Beverly Enterprises*, 476 F.2d 393 (9th 1973) 11

Wayne Investment, Inc. v. *Gulf Oil Corp.*, 739 F.2d 11 (1st. Cir. 1984) 8, 9, 11

Wool v. *Tandem Computers, Inc.*, 818 F.2d 1433 (9th Cir. 1987) 9

Miscellaneous:

Fed. R. Civ. P. 9(b) ..... *passim*

Fed. R. Civ. P. 11 2

Fed. R. Civ. P. 12(b)(6) 2, 7

2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 9.03[3] (2d ed. 1987) 9

5 C. Wright & A. Miller, Federal Practice and Procedure (1969) 8, 9

No. 88-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONATHAN STERN,

Petitioner,

– against –

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents* Leucadia National Corporation, LNC Investments, Inc., Charter National Life Insurance Company, American Investment Company, Leucadia Inc., Uintah National Corp., TLC Associates, Ian N. Cumming, Joseph S. Steinberg, Cumberg, Inc., Marks Investing Corp. and S&S

* This brief is submitted on behalf of all respondents except Carl Marks & Co., Inc. Pursuant to an Order dated April 16, 1987, the District Court approved a Settlement Agreement between plaintiff Stern and defendant Carl Marks & Co., Inc.

Securities, Inc. ("Respondents") submit this brief in opposition to the petition for certiorari filed by Jonathan Stern ("Petitioner") in this matter.

OPINIONS BELOW

The District Court for the Southern District of New York dismissed the complaint, with leave to be replead, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted and pursuant to Fed. R. Civ. P. 9(b) for failure to plead fraud with the requisite particularity. The opinion of the District Court is reported at 644 F. Supp. 1108 (S.D.N.Y. 1986) and is Appendix A to the petition.

The District Court similarly dismissed the amended complaint and also awarded sanctions against Petitioner pursuant to Fed. R. Civ. P. 11. The amended complaint is Appendix B to the petition. The transcript of the oral opinion of the District Court dismissing the amended complaint "entirely on the original opinion" is Appendix C to the petition.

The Court of Appeals for the Second Circuit affirmed the decision of the District Court dismissing the amended complaint pursuant to Fed. R. Civ. P. 9(b), without deciding the District Court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6), and reversed the award of sanctions. The opinion of the Court of Appeals is reported at 844 F.2d 997 (2d Cir. 1988), in Fed. Sec. L. Rep. (CCH) Current Vol., ¶ 93,717 (2d Cir. 1988), and is Appendix E to the petition.

STATUTE INVOLVED

The provision involved is Fed. R. Civ. P. 9(b). Its text is set out at Appendix F to the Petition.

STATEMENT OF THE CASE

Petitioner contends that Respondents made a substantial investment in GATX Corporation ("GATX") and then offered to acquire GATX in a cash merger – first at $38 per share and

then at $40 per share – with no intention of consummating the acquisition, but with the true prupose of inflating the market price of GATX stock so that either GATX itself or some other acquirer would purchase Respondents' stake in GATX. Petitioner further contends Respondents failed to disclose their true intentions in their filings with the Securities and Exchange Commission (the "SEC"), thus misleading persons who purchased GATX stock in anticipation that Respondents would consummate the acquisition of GATX. After the acquisition did not materialize, it is alleged, the price of GATX decreased.

Petitioner now contends that Respondents' failure to disclose their "true purpose" has somehow injured him in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") notwithstanding the pleaded facts that: (a) Respondents' proposal to acquire GATX was always conditional; (b) Respondents had disclosed in their filings with the SEC that they might withdraw their merger proposal and sell their GATX shares; (c) after Respondents made their $40 per share proposal, two other bidders made offers higher than Respondents' proposal; and (d) Petitioner bought his GATX at a price of $41.50 per share – one dollar and fifty cents per share higher than Respondents' proposed offering price – after the two competing higher offers had been announced. Moreover, nowhere is it alleged that Respondents actually sold – or even attempted to sell – their GATX shares to GATX or anyone else at a profit.

Properly characterized, Petitioner was a rank speculator. He determined that GATX was "in play" and took the risk that someone would acquire GATX for more than his $41.50 per share purchase price. When his speculation did not pay off, Petitioner sought to blame his faulty investment judgment on Respondents by bootstrapping a conditional proposal (at a price lower than Petitioner's own acquisition price) into a false representation that Respondents would consumate a transaction with GATX under all circumstances. As the District Court held, Petitioner simply failed to state a claim for relief under Section 10(b).

Further, both the District Court and the Court of Appeals correctly held that Petitioner failed to plead fraud with the

requisite particularly. The amended complaint did nothing more than set forth speculative and conclusory assertions, based solely on "information and belief," that Respondents never intended to make a *bona fide* offer for GATX, and that Respondents sought only to sell their GATX shares to GATX or a third party for a profit. Petitioner improperly attempted to use the garb of the securities laws without any particularization. Accordingly, the amended complaint was properly dismissed for failure to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). The facts as alleged are briefly set forth as follows.

On January 9, 1986, Respondents filed a Schedule 13D with the SEC (the "Schedule 13D") disclosing that they had acquired approximately 5.3% of GATX's approximately 13 million outstanding common shares. (App. B ¶ 5.) Respondents disclosed in this public filing that from time to time they would evaluate their position and might determine to seek control of GATX. (App. B ¶ 5.)

Significantly, Respondents also disclosed that:

> Depending upon the course of action that [Leucadia] pursue[s], [Leucadia] may attempt to dispose of shares of [its GATX] Common Stock in the open market, in privately negotiated transactions or otherwise.

(App. B ¶ 15.)

Respondents filed an amendment to their Schedule 13D, disclosing that Respondents had sent a letter, dated February 11, 1986, to the Chairman of the Board of GATX proposing a cash merger pursuant to which all GATX shareholders (other than Respondents) would receive $38 per share in cash. (App. B ¶ 22.)

Significantly, Respondents' filing disclosed that their $38 cash merger proposal was conditional:

> . . . consummation of the transaction would be subject to negotiation, preparation and execution of a definitive merger agreement, the requisite regulatory

> approvals, satisfactory completion by Leucadia of diligence (which it would be prepared to commence promptly) and Leucadia's arrangement of requisite financing.

(App. B ¶ 22).

On February 13, GATX publicly announced its rejection of Respondents' $38 per share cash merger proposal. (App. B ¶ 26.)

On or about February 28, 1986, Adler & Shaykin proposed to acquire all outstanding GATX shares (which it did not already own) pursuant to a merger for a price of $40 per share. Respondents' response to the GATX rejection of their $38 merger proposal and Adler & Shaykin's $40 merger proposal was hardly that of one attempting to inflate the market in order to sell off his investment. Respondents neither attempted to sell their shares to GATX, Adler & Shaykin or anyone else, nor did Respondents support the Adler & Shaykin offer. Rather, Respondents determined to compete with Adler & Shaykin, and sent another letter, dated February 28, 1986, to the Chairman of the Board of GATX, this time proposing a cash merger pursuant to which all GATX shareholders (other than Respondents) would receive $40 per share in cash. (App. B ¶ 25.) Respondents publicly disclosed in an amendment to the Schedule 13D that their $40 per share proposal was subject to the same conditions as their $38 per share proposal. (App. B ¶ 26.)

On or about March 1, 1986, Gabelli & Co. proposed a merger with GATX in which all GATX shareholders would receive an unspecified combination of cash and notes to be valued at approximately $42 per share of GATX stock. (App. B ¶¶ 25-26, 29, 30.)[1]

On March 13, 1986, Respondents filed a further amendment to the Schedule 13D, disclosing that they had informed GATX

---

[1] On March 3, 1986, following the announcements of all three merger proposals for GATX described above, Petitioner purchased an unspecified number of GATX shares at a price of $41.50 per share – $1.50 per share more than Respondents' $40 proposal. (App. B ¶ 8.)

on March 12 that their diligence review of GATX had been completed, and they were willing to effect a cash merger pursuant to which GATX shareholders (other than Respondent) would receive $40 per share in cash. (App. B ¶¶ 27-28.)

On or about March 22, 1986, GATX publicly announced that it had accepted Respondents' $40 per share conditional proposal. In announcing its acceptance, GATX expressly acknowledged that Respondents' $40 per share proposal was contingent upon Respondents' ability to obtain adequate financing, the negotiation and execution of a definitive merger agreement, and GATX shareholder approval. (App. B ¶ 30.)

On March 31, 1986, Respondents filed another amendment to the Schedule 13D, disclosing that on March 25, 1986, they had "advised [GATX] that it would require additional time before determining whether to proceed with the transaction and that, because it had become evident on that day that certain additional financing would be required, it requested a seven-day extension until April 1, 1986 of the time by which a definitive merger agreement would have to be entered into." (App. B ¶ 34.) Respondents further disclosed that GATX announced that it would not grant Respondents' request and that the provisions of a standstill agreement between Respondents and GATX restricting Respondents' right to acquire GATX shares would remain effective. (App. B ¶ 34.) At no time does the amended complaint allege that Respondents withdrew the proposal.

Respondents' amendment reiterated their position, which already had been publicly disclosed, that Respondents would "continue to evaluate [their] position in light of [GATX's] response" and that Respondents would consider, *inter alia*, whether to (1) continue to negotiate with GATX for a merger or other business combination on the same or revised terms; (2) acquire additional GATX shares; and (3) dispose of their GATX shares in the open market, in negotiated transactions or otherwise.

Respondents held their GATX shares for several months before disposing of the shares in private transactions and in the market — not to GATX — and did not make a profit. (App. B ¶ 6.)

The District Court dismissed the complaint on the grounds that it failed to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6) and that it failed to satisfy the pleading requirements of Fed. R. Civ. P. 9(b) noting that "the complaint fail[ed] to state facts that support its conclusory allegations that Leucadia's intentions to pursue its merger proposal were not genuine." The District Court gave the petitioner leave to amend the complaint if he could allege sufficient facts to support his claim. The amended complaint was dismissed on the same basis as the original complaint and the District Court awarded Respondents costs incurred in moving to dismiss the amended complaint.

The Court of Appeals had "no difficulty agreeing with the court below that [Petitioner's] amended complaint does not pass muster under Rule 9(b)" since the amended complaint's allegations were based entirely on information and belief and contained little more than a "bald allegation" that Leucadia never intended to pursue a merger with GATX. The Court of Appeals, did not consider the District Court's dismissal pursuant to Rule 12(b)(6), and reversed the award of sanctions imposed by the district court.

REASONS FOR DENYING THE WRIT

The decision below correctly applied Rule 9(b) and is consistent with courts in other circuits.

The Court of Appeals' decision correctly interprets Rule 9(b) and is consistent with the decisions of courts in other circuits. Rule 9(b) is designed to prevent wholly unfounded allegations of misconduct that can harm the reputation and goodwill of parties who have done no wrong and are litigated solely for the *in terrorem* effect. The Second Circuit's interpretation of the rule is neither novel nor unusual but rather is consistent with the way Rule 9(b) is applied in other circuits. Accordingly, there is no compelling reason why *certiorari* should be granted here.

It is a well-settled principle of law that Rule 9(b) requires that allegations of fraud must be pleaded with particularity.

See Semegen v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985); *Segal* v. *Gordon*, 467 F.2d 602, 607 (2d Cir. 1972); *Robison* v. *Caster* 356 F.2d 924, 925 (7th Cir. 1966); 5 C. Wright and A. Miller, Federal Practice and Procedure § 1297. Mere conclusions or general allegations of fraud are not sufficient. *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d. Cir. 1971); *Kellman* v. *ICS, Inc.*, 447 F.2d 1305, 1310 (6th Cir. 1971). *See Decker* v. *Massey-Ferguson, Ltd.*, 681 F.2d 111, 116, 118 (2d Cir. 1982) (allegations that are "simply conclusory rhetoric, [rather than] an 'allegation of facts amounting to deception,' " (quoting *O'Neill* v. *Maytag*, 339 F.2d 764, 768 (2d Cir. 1964)), "fail[ed] to provide an adequate factual substantiation for its accusations and fail[ed] to concretize acceptably the alleged fraud").[2]

As the Court of Appeals in this case correctly observed:

> Fed. R. Civ. P. 9(b) is designed to further three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of a defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits.

Stern v. *Leucadia National Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988). *See also Semegen* v. *Weidner*, 780 F.2d at 731; *Wayne Investment, Inc.* v. *Gulf Oil Corp.*, 739 F.2d 11, 13 (7th Cir. 1984); Wright & Miller § 1296.

The rule ensures that the complaint will set forth all the relevant facts and not serve simply as a fishing expedition to

---

[2] Other circuits have applied Rule 9(b) in a similar manner. *See, e.g., Skycom Corp.* v. *Telstar Corp.*, 813 F.2d 810 (7th Cir. 1987) (claim that defendant never intended to perform contract failed to plead fraud with particularity); *Semegen* v. *Weidner*, 780 F.2d 727 (9th Cir. 1985) ("plaintiffs have done nothing more than set forth conclusory allegations of fraud, conspiracy to commit securities fraud and aiding and abetting in securities fraud punctuated by a handful of neutral facts"); *Kellman* v. *ICS Inc.*, 447 F.2d 1305 (6th Cir. 1971) (failure to specify which statements were false and why); *Duane* v. *Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962) ("allegations of fraud such as are here involved when made on 'information, and belief' must be accompanied by a statement of the facts upon which the belief is founded").

uncover facts. *Friedlander* v. *Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985) (rule's "clear intent is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed"); *Segal* v. *Gordon*, 467 F.2d 602, 608 (2d Cir. 1972) ("[the complaint] should serve to seek redress for a wrong, not to find one"). *See also Wayne Investment Inc.* v. *Gulf Oil Corp.*, 739 F.2d at 14.

This Court has observed that to the extent meritless claims allow a plaintiff "to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). *See also Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

It is also a well-settled principle that allegations of fraud based upon information and belief do not satisfy Rule 9(b)'s pleading requirements. *Di Vittorio* v. *Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987); *Wool* v. *Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987); *Hayduk* v. *Lanna*, 775 F.2d 441, 444 (1st Cir. 1985). While fraud allegations may be so pleaded as to facts peculiarly within the opposing party's knowledge, such allegations must be accompanied by a statement of facts upon which the belief is founded. *Wool* v. *Tandem Computers Inc.*, 818 F.2d at 1439; *Hayduk* v. *Lanna*, 775 F.2d at 444; *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.); *Duane* v. *Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962); *Elster* v. *Alexander*, 75 F.R.D. 458, 461 (N.D. Ga. 1977); *Arpet, Ltd.* v. *Homans*, 390 F. Supp. 908, 912-13 (W.D. Pa. 1975); 2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 9.03[3] (2d ed. 1987); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1298 (1969). As Judge Friendly stated in *Denny* v. *Barber*:

> Recognizing the difficulties encountered by a small stockholder in framing a Rule 10b-5 complaint against a large corporation which has not been the subject

> of a publicized official investigation and the consequent need, noted in *Schlick*, for relaxing the requirement that allegations of fraud should be based on something more than information and belief, *there still must be more than vague allegations* [of misconduct].

Denny v. *Barber*, 576 F.2d 464, 470 (2d Cir. 1978) (emphasis added).

The amended complaint in this action, based solely upon information and belief, failed to state any facts indicating any fraud by Respondents, let alone any facts upon which Petitioner's belief that a fraud occurred could be founded. Petitioner failed to state anything but conclusory allegations that Respondents intentionally omitted from their Schedule 13D and amendments their "true" motive in acquiring GATX stock and that their "true" motive was not to make a *bona fide* bid for GATX, but rather to inflate the price of GATX stock to enable it to sell its GATX stock or to induce another entity to make a bid above market price for GATX. Petitioner merely contradicted the full and complete disclosures by Respondents without offering a single fact on which the contradiction is based.

Indeed, Petitioner's Petition for a Writ of Certiorari still fails to identify any facts which support the conclusory assertion that Respondents' purpose was other than that which they disclosed. Moreover, notwithstanding Petitioner's perjorative allegations that Respondents are "greenmailers" and that their "true purpose" was to "greenmail" GATX, nowhere did Petitioner allege (1) that Respondents withdrew their merger proposal or (2) that Respondents sought from GATX, let alone discussed with GATX, the repurchase of their shares by GATX.

In an unsuccessful effort to buttress his bald assertions, Petitioner alleged, without a single supporting fact to contradict the legitimacy of Respondents' need for additional financing, that Respondents' "claim that [it] suddenly discovered that the date on which some of GATX's debt would have to be paid would

be accelerated if GATX were merged into another company . . . was merely a pretext because Leucadia had long been in possession of all of GATX's debt documents and the alleged information suddenly discovered by Leucadia was not new or unusual." (App. B ¶ 31.) Petitioner also weakly relies on GATX's explanation for rejecting Respondents' request for an extension of time as the basis for inferring that Respondents did not intend to proceed with the transaction had GATX granted their request. The Court of Appeals correctly rejected these assertions as insufficient to comply with Rule 9(b)'s particularity requirement as Respondents' proposal was at all times conditioned on numerous contingencies, including obtaining financing, and Respondents had disclosed at all times that, among other possibilities, they might sell their GATX shares.

By suggesting that the Second Circuit requires evidentiary pleadings in order to satisfy the requirements of Rule 9(b), Petitioner mischaracterizes the decision below as misreading Rule 9(b) and inconsistent with the interpretations of the Rule by courts in other circuits. The Second Circuit, as do other circuits, however, require that conclusory allegations that a defendant's conduct was fraudulent, "punctuated by a handful of neutral facts," are insufficient and that allegations of fraud, based upon information and belief, must be accompanied by a statement setting forth the facts upon which the belief is founded. *E.g.*, *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985); *Hayduk* v. *Lanna*, 775 F.2d 441, 444 (1st Cir. 1985); *Wayne Investment, Inc.* v. *Gulf Oil Corp.*, 739 F.2d 11, 14 (1st Cir. 1984); *Walling* v. *Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973); *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d Cir. 1971); *Duane* v. *Aitenburg*, 297 F.2d 515, 518 (7th Cir. 1962).

Petitioner has failed to meet these well-settled standards of pleading. Indeed, Petitioner's insistence that he requires discovery before he can comply with the requirements of Rule 9(b) (Petition for Writ at 3-4) is precisely the kind of strike suit strategy that Rule 9(b) was designed to avoid. In short, the amended complaint here amounts to nothing more than the kind of expeditionary pleading which concerned this Court in *Blue*

Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975), where Justice Rehnquist observed:

> [a securities law] complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.

Id. at 740. *See also Decker* v. *Massey-Ferguson Ltd.*, 681 F.2d at 114 (citing Justice Rehnquist's statement with approval).

The Court of Appeals, therefore, properly dismissed Petitioner's "expeditionary" amended complaint for failure to meet Rule 9(b)'s specificity requirement.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DENNIS J. BLOCK
WEIL, GOTSHAL & MANGES
Attorneys for Respondents
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

APPENDIX

Pursuant to Rule 28.1, the parents, subsidiaries (except wholly-owned subsidiaries) or affiliates of Respondents are set forth below:

Respondent	Parent	Subsidiary or Affiliate
Leucadia National Corporation	Uintah National Corporation	BRAE Corp., American Investment Corp. PHLCORP, Inc.
LNC Investments, Inc.	Leucadia, Inc.	PHLCORP, Inc.
Charter National Life Insurance Company	Leucadia National Corporation	– –
American Investment Company	Leucadia National Corporation	– –
Leucadia Inc.	Leucadia National Corporation	– –
Uintah National Corp.	TLC Associates	Leucadia National Corporation
TLC Associates	– –	– –
Cumberg, Inc.	– –	– –
Marks Investing Corp.	Leucadia National Corporation	– –
S&S Securities Corp. (merged into its parent, Stern & Stern Industries, Inc., formerly Stern & Stern Huguet Textiles, Inc.)	– –	– –

Supreme Court, U.S.
FILED
AUG 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-116

In the

Supreme Court of the United States

OCTOBER TERM 1987

JONATHAN STERN, on behalf of himself and all others similarly situated,

Petitioner,

v.

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROGER W. KIRBY
KAUFMAN MALCHMAN KAUFMANN & KIRBY
919 Third Avenue
New York, NY 10022
(212) 371-6600

Attorney for Petitioner

RECEIVED
AUG 27 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

I. The cases themselves specifically state that there is a conflict between the Second Circuit's stringent application of Rule 9(b) and the interpretation of Rule 9(b) by the other circuits 1

TABLE OF AUTHORITIES

Cases Cited:

Christidis v. First Pennnsylvania Mortgage Trust, 717 F.2d 96 (3d Cir. 1983) 1, 2

Citizens State Bank v. The Federal Deposit Insurance Corp., 639 F. Supp. 758 (W.D. Okla. 1986) 4

In re U.S. Healthcare, Inc. Securities Litigation, 1988 U.S. Dist. Lexis, p. 9 (E.D. Pa.) 2

In re Washington Public Power Supply System Securities Litigation, 623 F. Supp. 1466, 1471 (W.D. Wash. 1985) 3

Kitchens v. U.S. Shelter Corp., [1984-85 Transfer Binder] Fed.Sec.L.Rep. (CCH), ¶91,838, p. 90,200 (D.S.C. 1984) 3

McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226 (1st Cir. 1980) 4, 5

Statutes Cited:

Fed. R. Civ. P. Rule 9(b) ..... *passim*

Other Authorities:

Note, *Pleading Securities Fraud with Particularity under Rule 9(b)*, 97 Harv. L. Rev. 1432, 1433, n. 7 (1984) 4

In the

Supreme Court of the United States

OCTOBER TERM 1987

JONATHAN STERN, on behalf of himself and all others similarly situated,

Petitioner,

v.

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I.

The cases themselves specifically state that there is a conflict between the Second Circuit's stringent application of Rule 9(b) and the interpretation of Rule 9(b) by the other circuits.

Respondents assert that the Second Circuit's interpretation of Rule 9(b) is applied in other circuits and that, therefore, there is no conflict between the circuits. However, the cases themselves acknowledge the conflict.

Thus, in *Christidis v. First Pennnsylvania Mortgage Trust*, 717 F.2d 96 (3d Cir. 1983), the Third Circuit specifically stated:

"The defendants, relying on certain cases decided in the Second Circuit, urge that we should read Rule 9(b) as a special pleading rule designed to facilitate the disposition, before discovery, of what they refer to as strike suits in the securities industry. We find more appropriate guidance, however, closer to home. . . . (*Id.*, at 99)

* * *

"In applying the first sentence of Rule 9(b) courts must be sensitive to the fact that its application, prior to discovery, may permit sophisticated defrauders to successfully conceal the details of their fraud. Moreover, in applying the rule, focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.' 5 C. Wright & A. Miller, Federal Practice and Procedure § 1298, at 407 (1969)." (*Id.*, at 99-100)

There are numerous similar statements by the district courts, such as:

" . . . the decisions of the courts in the Second Circuit are distinguishable in light of the fact that the courts of this circuit [the Third] have rejected the stringent standard adopted by the Second Circuit. See, *Recchion v. Westinghouse Electric Corp.*, 606 F. Supp. 889, 894 (W.D. Pa. 1985) (noting that 'this circuit appears to temper the quantum of specificity demanded by the Second Circuit' under Rule 9(b)." *In re U.S. Healthcare, Inc. Securities Litigation*, 1988 U.S. Dist. Lexis, p. 9 (E.D. Pa.)

* * *

"The defendants rely on authority from the Second Circuit, which has dismissed various cases

on the ground of insufficient particularity. See, *Billard v. Rockwell International,* 683 F.2d 51 (2nd Cir. 1982). The Fourth Circuit, however, has refused to adopt these stringent pleading requirements." *Kitchens v. U.S. Shelter Corp.* [1984-85 Transfer Binder] Fed.Sec.L.Rep. (CCH), ¶91,838, p. 90,200 (D.S.C. 1984).

* * *

"In support of their Rule 9(b) arguments, the defendants cite a series of Second Circuit cases that adopt an expansive interpretation of Rule 9(b). See, e.g., *Decker v. Massey Ferguson, Ltd.,* 681 F.2d 111 (1982); *Ross v. A.H. Robins,* 607 F.2d 545 (1979), *cert. denied,* 446 U.S. 946 (1980). The Ninth Circuit has adopted a more relaxed interpretation of the requirements of Rule 9(b) that is more in keeping with the spirit of the liberal federal rule of notice pleading and consistent with Rule 8(a). See, e.g., *Walling v. Beverly Enterprises, supra; Bosse v. Crowell, Collier and MacMillan,* 565 F.2d 602 (1977); *Gottreich v. San Francisco Investment Corp.,* 552 F.2d 866 (1977)." *In re Washington Public Power Supply System Securities Litigation,* 623 F. Supp. 1466, 1471 (W.D. Wash. 1985)

* * *

"Defendants rely heavily on cases from the Second Circuit, especially the Southern District of New York, that have developed extremely stringent pleading requirements. E.g., *Todd v. Oppenheimer & Co., Inc.,* 78 F.R.D. 415 (S.D.N.Y. 1978). However, such a return to 'fact pleading' is far greater than that required in most circuits, including our own [the Tenth], where Rule 9(b) must be read in conjunction with Rule 8's policy of 'notice pleading.' *See generally,* 5 Wright &

> Miller, *Federal Practice and Procedure*, §1298 (1969); Note, *Pleading Securities Fraud with Particularity under Rule 9(b)*, 97 Harv. L. Rev. 1432, 1433 n. 7 (1984)." *Citizens State Bank v. The Federal Deposit Insurance Corp.*, 639 F. Supp. 758, 762 (W.D. Okla. 1986)

Thus, the Note, *Pleading Securities Fraud with Particularity under Rule 9(b)*, 97 Harv. L. Rev. 1432, 1433, n. 7 (1984), states:

> "For the last decade, the Second Circuit has consistently required far greater specificity in pleadings alleging fraud than have other circuits."

In regard to the question of pleading fraudulent intent under Rule 9(b)—the question in this case—the First Circuit, in stating, in *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226 (1st Cir. 1980), the general rule that Rule 9(b) does not require the pleading of circumstances or evidence from which fraudulent intent could be inferred, cited as *contra* a Second Circuit decision. The First Circuit stated (*Id.*, at 228-229):

> "We do not agree that recovery against Lenoci was unwarranted because intent to defraud was inadequately pled. . . . The clear weight of authority is that Rule 9 requires specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred. *E.g., Cramer v. General Tel. & Elecs. Corp.*, 582 F.2d 259, 272-73 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed.2d 90 (1979); *Felton v. Walston & Co.*, 508 F.2d 577, 581-82 (2d Cir. 1974); *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973); 5 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 1297, at 403-04, § 1298, at 410, §

> 1301, at 426 (1969 ed.); 2A Moore's Federal Practice ¶9.03, at 9-23 (2d ed. 1979). *Contra, Ross v. A.H. Robins Co.*, 607 F.2d 545, 557-58 (2d Cir. 1979), *cert. denied*, 446 U.S. 946, 100 S.Ct. 2175, 64 L.Ed. 802 (1980). This interpretation of Rule 9 comports with its language, harmonizes the rule with Rule 8, which requires that averments in pleadings be concise and direct, and at the same time fulfills a major purpose of Rule 9: to give adequate notice of the plaintiff's claim of fraud or mistake, *see* 5 C. Wright & A. Miller, *supra*, § 1297, at 403-04. Judged by this standard, the complaint here complied with Rule 9(b)."

The Second Circuit's decision in this case is particularly egregious because, although not required by Rule 9(b), the complaint does allege circumstances or evidence supporting petitioner's claim of fraudulent intent. The gravamen of the complaint is that, contrary to its statements and filings, Leucadia never intended to acquire GATX in a merger but instead its purpose was to extract greenmail from GATX or to elicit a higher bid from a third person for GATX. The complaint alleges:

> —Leucadia requested GATX (which had accepted a merger with Leucadia) for an extension of time to complete the merger because, assertedly, it needed additional financing due to the sudden and unexpected discovery that some of GATX's debt would be accelerated because of the merger. Leucadia's request was a pretext because Leucadia had long been in possession of all of GATX's debt documents and the information allegedly suddenly discovered was not new or unusual (Pet. App. B, ¶31).
>
> —GATX publicly stated that it would not grant Leucadia the extension because it believed that

Leucadia's claimed need for an extension was false. (*Id.*, at ¶32).

—Leucadia had a history of greenmail (*Id., at* ¶33).

Stating that "circumstances must be pleaded that provide a factual foundation for otherwise conclusory allegations of scienter" (Pet. App. E., 91a), the Second Circuit proceeded itself to weigh the sufficiency of the factual allegations of the complaint (*Id.*, 91a-93a) and concluded that they did not "pass muster under Rule 9(b)." (*Id.*, 91a). Since the Second Circuit omitted any reference to the pleaded and indisputable fact that GATX itself publicly stated that Leucadia's claimed need for an extension of time was false, the Second Circuit did not explain why GATX, which had earlier accepted the merger proposal, would make such a statement without any basis.

The remainder of respondents' brief devotes itself to arguments respecting the "findings" by the court below, which confirms petitioner's concerns that, under the Second Circuit view of Rule 9(b), not only must the complaint plead the circumstances or evidence of fraudulent intent but also the courts, acting without the benefit of any record whatever, are free to weigh the sufficiency of the factual allegations and, even further, to make their own findings respecting the merits.

Certiorari is required here to resolve a conflict among the circuits upon an important and recurring question of law.

Dated: New York, New York
August 25, 1988

Respectfully submitted,

ROGER W. KIRBY
KAUFMAN MALCHMAN KAUFMANN
& KIRBY
919 Third Avenue
New York, NY 10022
(212) 371-6600

Attorney for Petitioner